(1)

SHOW PROCEEDINGS AND ORDERS DATE: [05/01/96]

CASE NBR: [95100856] CFX STATUS: [DECIDED]
SHORT TITLE: [Janklow, Gov. of SD, et al.]
VERSUS [Planned Parenthood, et al.] DATE DOCKETED: [120195]
PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Nov 29 1995		Petition for writ of certiorari filed. (Response due December 31, 1995)
Dec 29 1995		Brief of respondents Planned Parenthood, et al. in opposition filed.
Jan 2 1996		Motion of National Right to Life Committee, Inc. for leave to file a brief as amicus curiae filed.
Jan 10 1996		DISTRIBUTED. February 16, 1996
Jan 12 1996		Reply brief of petitioners William Janklow, Governor, et al. filed.
Feb 13 1996		Record requested.
Feb 23 1996		Certified record of proceedings of the United States Court of Appeals for the Eighth Circuit (11 documents).
Feb 27 1996		RECORD Recieved from USDC-SD Original record proceedings
Feb 28 1996		REDISTRIBUTED. March 15, 1996
Mar 18 1996		REDISTRIBUTED. March 22, 1996

Last page of docket

SHOW PROCEEDINGS AND ORDERS DATE: [05/01/96]

CASE NBR: [95100856] CFX STATUS: [DECIDED]
SHORT TITLE: [Janklow, Gov. of SD, et al.]
VERSUS [Planned Parenthood, et al.] DATE DOCKETED: [120195]
PAGE: [02]

DATE	NOTE	PROCEEDINGS & ORDERS
Mar 25 1996		REDISTRIBUTED. March 29, 1996
Apr 8 1996		REDISTRIBUTED. April 12, 1996
Apr 15 1996		REDISTRIBUTED. April 19, 1996
Apr 22 1996		REDISTRIBUTED. April 26, 1996
Apr 29 1996		Motion of National Right to Life Committee, Inc. for leave to file a brief as amicus curiae GRANTED.
Apr 29 1996		Petition DENIED. Opinion by Justice Stevens respecting denial of certiorari. Dissenting opinion by Justice Scalia with whom The Chief Justice and Justice Thomas join. (Detached opinion.)

****

1pp

(1) Supreme Court, U.S.
FILED
95-856 NOV 29 1995
No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

WILLIAM J. JANKLOW, GOVERNOR,
AND MARK W. BARNETT, ATTORNEY GENERAL,
IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

PLANNED PARENTHOOD, SIOUX FALLS CLINIC,
BUCK J. WILLIAMS, M.D., AND
WOMEN'S MEDICAL SERVICES, P.C.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

MARK W. BARNETT
Attorney General
State of South Dakota
Counsel of Record

JOHN P. GUHIN
JANINE KERN
Deputy Attorneys General
500 East Capitol
Pierre, SD 57501-5070
Telephone (605) 773-3215
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

114 pp

QUESTIONS PRESENTED

WHETHER *UNITED STATES v. SALERNO* CONTINUES TO APPLY TO FACIAL CHALLENGES TO ABORTION LAWS?

WHETHER THE CONSTITUTION REQUIRES A ONE-PARENT NOTICE OF ABORTION STATUTE TO CONTAIN A JUDICIAL BYPASS MECHANISM, WHERE THE NOTICE REQUIREMENT IS WAIVED FOR A BROADLY DEFINED CLASS OF "ABUSED AND NEGLECTED" MINORS?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES CITED:

TABLE OF AUTHORITIES – Continued

Page

STATUTORY REFERENCES:

The Petitioners, William J. Janklow, in his official capacity as Governor of the State of South Dakota, and Mark W. Barnett, in his official capacity as Attorney General of the State of South Dakota, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on August 31, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 63 F.3d 1452 (8th Cir. 1995) and is reprinted in the Appendix. (App. at 1.)

The Memorandum Opinion of the United States District Court for South Dakota is reported at 860 F.Supp. 1409 (D.S.D. 1994). It is reprinted in the Appendix. (App. at 51.)

JURISDICTION

The jurisdiction of the United States District Court for the District of South Dakota was found to exist pursuant to 28 U.S.C. § 1331.

The jurisdiction of the court of appeals was invoked pursuant to 28 U.S.C. § 1291. On appeal by Petitioners and cross-appeal by Respondents, the United States Court of Appeals for the Eighth Circuit, on August 31, 1995, entered a judgment affirming the judgment of the district court. No petition for rehearing was sought.

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Eighth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

Due Process Clause of the Fourteenth Amendment to the United States Constitution.

> No state shall . . . deprive any person of life, liberty or property, without due process of law. . . .

SDCL 34-23A-7. App. at 83.

SDCL 26-8A-2. App. at 84.

STATEMENT OF THE CASE

During the 1993 legislative session, the South Dakota Legislature enacted SL 1993, ch. 249, codified at SDCL ch. 34-23A. About two weeks before the effective date of the act, Planned Parenthood was granted an ex parte TRO. App. at 39. The parties agreed to an extension of the order pending the outcome of the litigation.

The lawsuit attacked the provisions of the South Dakota statute designed to protect minors facing an abortion decision. SDCL 34-23A-7, App. at 83, requires the doctor to notify one parent (or guardian) of the impending operation on the unemancipated minor forty-eight hours before the abortion. No judicial bypass is provided. The notice requirement is waived by statute in the case of medical emergency,

if the person entitled to notice certifies it has been given, or if the minor provides information to the attending doctor that she is an "abused or neglected child" as broadly defined by SDCL 26-8A-2; App. at 84, and the abuse is properly reported. The "abuse and neglect" exception allows an abortion to be performed without notice to either parent if the child has been abandoned, has been subject to mistreatment or abuse, has lacked proper parental care, whose environment is injurious to her welfare, whose parent failed or refused to provide for her necessary subsistence, supervision, education or medical care, who is homeless, who is threatened with substantial harm, who has sustained emotional harm or mental injury, or is subjected to sexual abuse, molestation or exploitation by the parent or guardian. *Id.*

The district court, on summary judgment, struck down the one-parent notice provision. The court noted that the one-parent notice was "less restrictive upon the abortion decision than the statute considered in *Hodgson*" but held that it was immaterial whether there was a "one-parent or a two-parent notice provision." App. at 64. Without making any specific factual findings on the issue, the court found that the omission of the bypass constituted an "undue burden on the minor's privacy right to make the abortion decision." App. at 64. The district court also found that the exemption from the notice requirement for "abused and neglected children" set out at SDCL 26-8A-2 did not save the statute. App. at 64-66.

The court of appeals affirmed "in all respects."[1] App. at 2. The court of appeals first examined the appropriate

[1] The district court also upheld the informed consent provisions of the state statute, App. at 71-74, but struck down the civil

"standard for a challenge to the facial constitutionality of an abortion law." App. at 9. The court acknowledged that the circuit courts "have split on the question of whether *[Planned Parenthood v.] Casey*[, 112 S.Ct. 2791 (1992)], effectively overruled [*United States v.*] *Salerno*[, 481 U.S. 739 (1987),] for abortion cases." App. at 10. The court noted that "the standard we choose to follow today may well determine the outcome of this case." App. at 11. The court ultimately found that *Salerno* had been effectively overruled "for facial challenges to abortion statutes" and applied the "*Casey* standard" to the parental notice provisions of South Dakota law. App. at 12.

The court further recognized that the "Supreme Court has yet to decide whether a mature or 'best interest' minor is unduly burdened when a State requires her physician to notify one of her parents before performing the abortion." App. at 16.

The court nonetheless struck down the statute both with regard to "best interest" and "mature" minors. The court's analysis was generally based upon the theory that one-parent notice statutes are the rough equivalent of consent statutes. *See* App. at 16; *id.* at 17, citing *Bellotti v. Baird*, 443 U.S. 622, 643-644 (1979). Likewise, the Court, in effect, asserted the equivalency of a one-parent and two-parent statutes. *See* App. at 17, 24, n.10.

---

and criminal liability sections of the statute, App. at 68-71, 74-76. These determinations were upheld on appeal, App. at 35-36, 27-35. None of these questions are before this Court on this Petition.

More specifically, with regard to so-called "mature" minors, the court essentially applied the *Casey* holding striking down a *spousal* notice requirement to a *single parent* notice requirement. App. at 16, 23.

As to "immature" or "best interest" minors, the court of appeals rejected South Dakota's assertion that the exception for abused and neglected minors satisfied any need for a judicial bypass procedure. South Dakota's abortion law allows a doctor to perform an abortion on a minor if she provides information that any one of the broad exceptions set forth in SDCL 26-8A-2 (App. at 84) is present.

The court held that the doctor who would perform the abortion is not a " 'neutral and detached agency' " and therefore does not qualify as an independent decision maker. App. at 22. The court also held that the bypass fell short of protecting the confidentiality of the "abused and neglected" minor's decision to have an abortion. App. at 20-21. The court thus failed to credit the effectiveness of the extensive procedures to guarantee confidentiality as set out by statute, by the Department of Social Services and by the Attorney General's Office.

The court also rejected the State's contention that Planned Parenthood had failed to demonstrate that the statute imposed an undue burden on a large fraction of affected minors. App. at 23-25. No statistics were cited by the court.

The court of appeals drew special attention to minors who had been sexually abused and noted that they might not be able to use the exceptions provided by the "abuse and neglect" statute. *Id.* at 24-25. The court impliedly

rejected the State's argument that, if the sexual abuse is the reason justifying an abortion in a *judicial* procedure, and if the minor cannot talk about that sexual abuse, then the child would not obtain an abortion through a judicial procedure in any event. More importantly, the court ignored the State's argument that sexual abuse is certainly more easily revealed to a doctor in private, under the challenged statute, than to a judge in a judicial setting.

REASONS FOR GRANTING THE WRIT

I

THE EIGHTH CIRCUIT COURT OF APPEALS HAS DETERMINED AN IMPORTANT QUESTION OF FEDERAL LAW – i.e. WHETHER *UNITED STATES V. SALERNO* CONTINUES TO APPLY TO FACIAL CHALLENGES TO ABORTION LAWS – IN CONFLICT WITH THE FIFTH CIRCUIT COURT OF APPEALS.

Prior to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992), this Court had applied the test set out in *United States v. Salerno*, 481 U.S. 739 (1987), to facial challenges to abortion laws. *See Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J.).

The decisions of the circuit courts subsequent to *Casey* have "split on the question whether *Casey* effectively overruled *Salerno* for abortion cases." App. at 10. The Third Circuit believes that *Salerno* has been overruled, *see Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3rd Cir. 1994) (on remand) (dicta). The Fifth Circuit has

refused to "interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes," *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir.), *cert. denied*, 113 S.Ct. 1656 (1992), and that Circuit "continues to apply the *Salerno* standard." App. at 10. The Eighth Circuit Court of Appeals has been uncertain. In *Fargo Women's Health Organization v. Schafer*, 18 F.3d 526, 529 (8th Cir. 1994), the court stated that if the Joint Opinion in *Casey* wanted to depart from the *Salerno* standard, "we believe they would have specifically stated that the standard did not apply." In the present litigation, however, the circuit panel found that *Salerno* had been overruled. Similarily, Justices O'Connor and Souter found in their concurrence to the Memorandum Decision in *Fargo Women's Health Organization v. Schafer*, 113 S.Ct. 1668 (1993), that *Salerno* had been undermined.

The importance of resolving the issue is clear. As the court of appeals recognized, "the standard we choose to follow today may well determine the outcome of this case." App. at 11. Indeed, the court points out that "circumstances [do] exist under which the South Dakota law would be constitutional. . . . " *Id.* It follows that the result in this case *would* be different if *Salerno* controls.

II

THE QUESTION OF WHETHER A JUDICIAL BYPASS IS REQUIRED IN A SINGLE-PARENT NOTICE STATUTE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

In *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510 (1990) (*Akron II*), this Court stated

> we have not decided whether parental notice statutes must contain such [bypass] procedures.

The question remains unanswered to this day, as explicitly recognized by the court of appeals, App. at 16. This case raises that issue in the context of the least intrusive notice statute – that is, one requiring notice to only one parent.

A. The issue has national importance.

Not only is the case of one of first impression, but it has national importance. State legislatures are the classic laboratories of democracy. To function properly in an area which touches on constitutional rights, questions such as are raised in this case should be decided by this Court so as to give the legislatures the necessary judicial guidance.

Furthermore, although Petitioner South Dakota is presently the only state with a single-parent notice statute with no judicial bypass, it can be safely assumed that other states would carefully consider this option were it deemed to be constitutionally available. This follows because the only other options – ignoring the moral and ethical challenge of the abortion decision or adopting a

judicial bypass – are so plagued with difficulties. Ignoring the challenge is considered irresponsible by many state legislatures. But adopting a statute with a judicial bypass carries with it very heavy costs as set out in this Court's opinion in *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

Hodgson cited, as accurate, the analysis of the district court that the judicial bypass was a trying emotional experience with substantial negative impacts:

> The court experience produced fear, tension, anxiety, and shame among minors, causing some who were mature, and some whose best interests would have been served by an abortion, to 'forego the bypass option and either notify their parents or carry to term.'

Hodgson, 497 U.S. at 441-442.

Moreover, the *Hodgson* court recognized that, of the judges who had heard ninety percent of the petitions, "none of them identified any positive effects of the law." *Hodgson*, 497 U.S. at 441. Indeed, the process can be accurately identified as a judicial "rubber stamp." *See Hodgson v. Minnesota*, 648 F.Supp. 756, 766 (D.Minn. 1986); Affidavit of Dr. Lyons at Exhibit C, Table 1.

B. The litigation raises basic questions relating to the relationship between a parent and child.

This Court has long recognized the strength of the parent-child relationship in the law. In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944), the Court stated:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981), demonstrates the strength of that relationship in a context analogous to that at issue here – the loss of custody of a child. In *Lassiter*, 452 U.S. at 27, the Court said that its decisions had

> by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'

The Court noted the "commanding" interest in the "accuracy and justice of the decision to terminate his or her parental status." *Id.* An important branch of that status – the knowledge of a child's consideration of an abortion – is at stake in this litigation.

Similarly, in *Hodgson*, 497 U.S. at 446, Justices Stevens and O'Connor found that

> the family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference.

Finally, Justice Kennedy, Chief Justice Rehnquist, Justices Scalia and White quoted *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), at *Hodgson*, 497 U.S. at 484, to the effect that:

> 'This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.'

It follows that the issues raised by this Petition are of national interest because they significantly impact the legal nature of the parent-child relationship and likewise impact the state's ability to enhance that relationship.

III

THE DECISION OF THE COURT OF APPEALS CONFLICTS, IN PRINCIPLE, WITH PRIOR DECISIONS OF THIS COURT WHICH ESTABLISH THAT THE "RATIONAL RELATIONSHIP" TEST SHOULD BE USED IN TESTING NOTICE STATUTES.

In *Hodgson*, a majority of the Court found that the "rational relationship" test should be used in testing parental notice statutes. In particular, Chief Justice Rehnquist, along with Justices Kennedy, Scalia and White indicated adherence to the rational relationship test with regard to the two-parent notice statute. *Hodgson*, 497 U.S. at 490, 496, 500-501. Furthermore, Justice Stevens in his opinion for the Court clearly adopted the "rational relationship" test when he effectively identified the issue as whether the two-parent notice statute would "reasonably further any legitimate state interest." *Hodgson*, 497 U.S. at 450. Moreover, Justice O'Connor's concurrence in *Hodgson* likewise applies the "rational relationship" test by agreeing with Justice Stevens that the statute at issue could not be " 'sustained if the obstacles it imposes are

not reasonably related to legitimate state interests.' " *Hodgson*, 497 U.S. at 459.[2]

The decision below, however, demonstrates that it is important for this Court to authoritatively determine whether the "rational relationship" or "undue burden" test should be employed in analyzing parental notice statutes.

IV

ALTERNATIVELY, EVEN IF THE UNDUE BURDEN TEST IS APPLICABLE, THE DECISION OF THE COURT OF APPEALS CONFLICTS, IN PRINCIPLE, WITH PRIOR DECISIONS OF THIS COURT.

Even if the "undue burden test" applies to parental notice statutes, the Respondents' case fails because it has failed to show existence of such a burden.

A. The South Dakota statute does not give a veto over an abortion with regard to any minor.

This Court has consistently indicated that a need for judicial bypass arises when a statute purports to give a *veto* power over an abortion to a minor. The South Dakota statute does not so operate in that it requires only a *notice* and only to *one* parent. In *Akron II*, 497 U.S. at 510, the

---

[2] *Planned Parenthood v. Casey* did not establish that the "undue burden test" must be used in both parental notice and parental consent cases as argued below. *Casey* is a *consent* case, *see Casey*, 112 S.Ct. at 2832, and there is no reason to read it to overrule *Hodgson*, which it cites twice in the brief decision of the parental consent statute there at issue. *Casey*, 112 S.Ct. at 2832.

Court stressed that the reason that a bypass procedure had been required in earlier cases was

> in order to prevent another person from having an *absolute veto power* over a minor's decision to have an abortion. . . . (Emphasis added).

The Court in that same decision indicated agreement with the decision in *H.L. v. Matheson*, 450 U.S. 398, 411, n.17 (1981), that

> notice statutes are not equivalent to consent statutes because they do not give anyone a veto power of (sic) over a minor's abortion decision.

Akron II, 497 U.S. at 511. Because South Dakota's statute is a notice, not a consent statute, it does not allow a veto and it does not, in that respect, impose an "undue burden." Moreover, the decision of the court of appeals, which was based on the thesis that South Dakota's notice statute was the rough equivalent of a consent statute, see, App. 16; *id.* at 17, citing *Bellotti*, 443 U.S. at 643-644, was accordingly incorrect.

B. The court of appeals erred in treating South Dakota's one-parent notice statute as equivalent to a two-parent statute.

Hodgson makes it abundantly clear that a one-parent notice statute may not be analyzed the same as a two-parent statute. *Hodgson*, 497 U.S. at 450 found that the

> requirement that *both* parents be notified . . . does not reasonably further any legitimate state interest. (Emphasis in original).

Furthermore, the Court found that while the second parent might have an "interest in the minor's abortion decision," the communication involved in such a decision-making process

> may not be decreed by the State. The State has no more interest in requiring all families to talk with one another than it has in requiring certain of them to live together.

Hodgson, 497 U.S. at 452. Justice O'Connor, in addition, specifically agreed with Justice Stevens that the State had "offered no sufficient justification for its interference with the family's decisionmaking process created by subdivision 2 [of the Minnesota statute] – two-parent notification." *Hodgson*, 497 U.S. at 459 (O'Connor, J. concurring). The court of appeals recognized the nature of the dispute. *See*, App. at 15-16 and n.8.

Nonetheless, the court of appeals, in effect, equated one-parent and two-parent notice provisions and essentially ignored the argument of the State that the distinction was a critical one. The court did comment in a footnote that it was "no answer to say that the minor could simply notify her other parent" and that "[r]oughly eighteen per cent. of South Dakota's minors live in single-parent homes. . . . " App. at 24, n.10. But *Hodgson* distinguished between one and two parent notice statutes, even in light of the finding of the district court in *Hodgson* that "9% of the minors in Minnesota live with *neither* parent and 33% live with *only one parent*." *Hodgson*, 497 U.S. at 437 (emphasis added).

The court of appeals' treatment of a one-parent notice statute as equivalent to a two-parent statute is inconsistent with *Hodgson* and is not based on a firm evidentiary foundation.

C. The court of appeals incorrectly extended the rationale of *Casey* for striking down spousal notice to the issue of one-parent notice with regard to "mature minors".

The essence of the decision of the court of appeals with regard to so-called "mature minors" is that, if a minor is mature enough to make her own decisions, the State cannot give one of the parents "a chance – or even a tool" to obstruct a decision to have an abortion, just as the State cannot give this tool to a woman's husband. App. at 17; *see id.* at 23.

The court of appeals thus essentially applied the rationale of *Casey*, 112 S.Ct. at 2829-30, with regard to the *spousal* notice, to the situation in which *one parent* would be notified. The application is erroneous as a matter of law.

First, the attempt to characterize the spousal relationship the same as the parent-child relationship is contrary to *Casey* itself. The Joint Opinion in *Casey* at 112 S.Ct. at 2831, flatly stated:

> A State may not give to a man the kind of dominion over his wife that parents exercise over their children.

Furthermore, the Joint Opinion analysis stated that although the spousal notice provision was unconstitutional, this "conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements." *Casey*, 112 S.Ct. at 2830.

The Joint Opinion continued at *id.*:

> Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interest at heart. We cannot adopt a parallel assumption about adult women.

Despite the message of *Casey*, the court of appeals found that if a minor "can demonstrate that she is mature, the State has no legitimate reason for imposing liberty restrictions upon her that it may not impose on an adult." App. at 23. The court thus validated an abortion for these minors for "good reasons," *id.*, or, presumably, for no reason at all. *Id.* The quintessence of the Court's ruling is thus that once the minor is adjudged "mature" (in a secret proceeding with no parental input), the parental role is eviscerated with regard to the abortion decision.

The decision of the court of appeals thus fails to protect the rights of parents which this Court has acknowledged in similar contexts, *see, e.g., Lassiter*, 452 U.S. at 27; *Prince v. Commonwealth of Massachusetts*, 321 U.S. at 166, and fails to recognize that parents are entitled to give assistance to their minor children facing difficult decisions. *See generally, Casey*, 112 S.Ct. at 2830-2832; *Hodgson*, 497 U.S. at 450. Furthermore, the decision fails

to recognize that any female, including, of course, a "mature" minor, may well have medical or psychological complications from her abortion, *see* Affidavit of Dr. Lyons at ¶¶ 8-9. *See also*, Affidavit of Dr. Elkind at ¶ 12. This puts the parents, (who remain, paradoxically, legally responsible for the minor), in the position of being unable to assist their "mature" minor because of their lack of knowledge of the situation. The decision of the court of appeals thus is inconsistent with other decisions of this Court recognizing the parents as the primary caretakers of their minor children.[3]

D. The South Dakota statute provides better protections for abuse victims than are available in judicial bypass states.

The court of appeals found that South Dakota's exception for abused and neglected children was deficient in that it did not adequately provide for the victims of sexual abuse. App. at 24-25. South Dakota's "abuse and neglect" exception specifically includes such victims. *See* SDCL 26-8A-2(8). App. at 85. The court of appeals found, however, that "many minors who are abused will not be able to use the abuse exception" because of the reluctance of abuse victims to admit the abuse, App. at 24-25, and that "[e]ven if South Dakota's exception were

---

[3] Furthermore, it should be noted that the California spousal notice statute at issue in *Casey* is not comparable to the South Dakota parental notice statute because the exceptions in Pennsylvania are quite narrow, *see Casey*, 112 S.Ct. at 2837 (Appendix) as compared to the broad exceptions from parental notice found in the South Dakota statute. *See* SDCL 26-8A-2, App. at 84.

otherwise acceptable, its failure to provide an alternative procedure for these minors would doom it." App. at 25.

The flaw in the analysis of the court of appeals is that this Court has specifically approved of a judicial bypass for best interest minors in the context of a *consent* statute. *Casey*, 112 S.Ct. at 2832. Obtaining an abortion by judicial order by reason of the abuse is dependent on *telling the judge of the abuse*. In South Dakota, the abuse victim is allowed to impart the abuse information in confidence. SDCL 34-23A-7(3). App. at 84. As South Dakota's affidavits indicate, it is certainly less of a burden on either an immature or mature minor to report abuse to a doctor than to a judge in a judicial bypass proceeding. *See* Affidavit of Dr. Elkind at ¶ 5; *see also*, Affidavit of Dr. Lyons, ¶¶ 27-29.

Furthermore, South Dakota's experts submitted affidavits which demonstrated that South Dakota's abuse reporting requirement will likely result in an *increased* number of adolescents reporting abuse. Affidavit of Asst. Attorney General Ronald Campbell at ¶ VIII; Affidavit of Judy Hines at ¶¶ XV-XVI; Affidavit of Dr. Lyons at ¶ 12. In other words, by sustaining the constitutionality of South Dakota's act, an additional number of young women will be able to get the assistance they critically and tragically need. Respondents' attack on the constitutionality of the statute stands in the way of the State achieving this important objective.[4]

---

[4] In any event, it should be noted that Respondent Dr. Williams reported 963 abortions on minors 17 years and younger between 1986 and 1993; he reported that only *one* of those pregnancies was aborted as a result of rape or incest. Affidavit of Doris J. Donner, Exhibit 3. *See also* Affidavit of Judy Hines, at ¶ XVII (Program administrator is unaware of any cases of abuse and neglect reported by Respondent Williams pursuant to SDCL 26-8A-3 within the last six years).

E. The South Dakota statutory arrangement will maintain the confidentiality of the abortion requested.

The court of appeals struck the South Dakota statute in part because it found that the "by-pass" for abused and neglected minors did not adequately protect the minor's confidentiality. App. at 20-21. No findings had been made by the district court on this issue.

The court of appeals decision conflicts with the strong language of SDCL 34-23A-7(3), (App. at 84), that

> the department of social services, the state's attorney and law enforcement officers . . . shall maintain the confidentiality of the fact that she has sought or obtained an abortion and shall take all necessary steps to ensure that this information is not revealed to her parents.

The court of appeals relied upon statutes regulating juvenile discovery proceedings, but that reliance was inappropriate; the provisions of the abortion law predominate over the discovery statutes relied on as a matter of South Dakota law because they are the later enacted statutes, *see In re Estate of Smith*, 401 N.W.2d 736, 740 (S.D. 1987), and because they pertain specifically to confidentiality requirements regarding abortions on minors. *See Bienert v. Yankton School District No. 63-3*, 507 N.W.2d 88, 91 (S.D. 1993). *See also Harding County v. South Dakota Land Users Association*, 486 N.W.2d 263, 265 (S.D. 1992)

(South Dakota courts will, when a reasonable construction is available, read statutes so as to uphold their constitutionality). The court likewise ignored the extensive procedures set out by the Department of Social Services to further guarantee the confidentiality of the information, *see* Affidavit of Judy Hines at ¶¶ X-XIV, and likewise ignored the Affidavit of Attorney General Barnett with regard to this matter. Affidavit of Mark Barnett at ¶ 8.[5]

Finally, it might be noted that the incidence of pregnancy occurring as a result of sexual abuse appears to be very infrequent. Ron Campbell, who reviews every sexual abuse case reported to the Department of Social Services on the Intake Worksheet, Affidavit of Asst. Attorney General Ronald Campbell at ¶ III, was aware of only "three pregnancies occurring as a result of incest" in his eleven year tenure. *Id.* at ¶ IV. Only one of those was terminated by abortion. *Id.* In that case, the child involved "voluntarily testified to this fact in a criminal trial to the court." *Id.* Thus, there was no record on which the court of appeals could determine that there is a significant chance that an abortion will be revealed in an abuse proceeding. *See also*, n.4, *supra*.

---

[5] The Court of Appeals likewise ignored the fact that while over 10,000 abuse and neglect reports were investigated in one year's time by DSS, no legal actions have ever been brought against it or its employees for breach of confidentiality. *See* Affidavit of Judy Hines at ¶ VIII.

F. The affidavits cited by the court of appeals failed to show the existence of a large fraction of minors who would be unduly burdened by South Dakota parental notice statute.

Neither the district court nor the court of appeals cited any statistics to demonstrate that a "large fraction" of affected minors would be "unduly burdened" by South Dakota's parental notice statute. *Casey*, 112 S.Ct. at 2830. Further, the district court did not cite or analyze affidavits in its decision as to the issue and made no factual findings thereon. The circuit court did make some examination of the affidavits but failed to give appropriate consideration to the distinctions which are critical in this case, including the distinction between one- and two-parent notice statutes.

As indicated above, the court in a footnote did attempt to justify the treatment of the one-parent statute on the same basis as a two-parent statute by finding that some minors lived with only one parent. App. at 24, n.10. Such statistics were offered in *Hodgson*, 497 U.S. at 437, but did not suffice to support identical treatment of one- and two-parent statutes in that case. *Hodgson*, 497 U.S. at 450; *see also*, *Hodgson*, 497 U.S. at 459-460 (O'Connor, J.). Nor do such statistics allow identical treatment of one- and two-parent statutes here.

Moreover, South Dakota established that the notice statute not only did not "unduly burden" minors, but the operation of that statute was to the minors' benefit. South Dakota demonstrated, for example, that when a parent was notified that a minor is considering an abortion, the parent can help the minor consider multiple perspectives

involved in the decision, and the parental notification requirement "will likely facilitate a better decision making process in the majority of cases." Affidavit of Dr. Lyons, ¶ 17. More critically, when a parent is notified of the abortion decision, he or she is available to help the minor deal with "more serious" medical complications which can take place in about five percent of the cases and with psychological complications, including depression and guilt, which "can occur in as many as one-quarter to one-third of cases." *Id.* at ¶ 8.

In short, the record does not allow the conclusion that an "undue burden" is created by South Dakota's one-parent notice requirement with regard to a "large fraction" of affected minors.

CONCLUSION

Wherefore, the Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

MARK W. BARNETT
Attorney General
Counsel of Record

JOHN P. GUHIN
JANINE KERN
Deputy Attorneys General
500 E. Capitol
Pierre, SD 57501-5090
Telephone: (605) 773-3215

November, 1995

APPENDIX

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 94-3326SD, 94-3398SD

Planned Parenthood, Sioux Falls Clinic; Buck J. Williams, M.D.; And Women's Medical Services, P.C., Appellees/ Cross-Appellants, v. Walter D. Miller, Governor, In His Official Capacity, And Mark W. Barnett, Attorney General, In His Official Capacity, Appellants/ Cross-Appellees.	On Appeal From the United States District Court for the Distict of South Dakota

Submitted: May 15, 1995

Filed: August 31, 1995

Before RICHARD S. ARNOLD, Chief Judge, JOHN R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge.

RICHARD S. ARNOLD, Chief Judge.

The Governor and Attorney General of South Dakota ("the State") appeal from a District Court[1] ruling that the parental-notice provision of its abortion law is unconstitutional on its face because it fails to provide a bypass mechanism to allow mature and "best interest" minors to proceed with an abortion without notifying a parent. The State also appeals the District Court's holding that its provisions for civil and criminal penalties for performing illegal abortions are unconstitutional because they lack a scienter requirement. In the alternative, the State asks us to certify to the South Dakota Supreme Court the issue of whether that court would interpret the civil-and-criminal penalty provisions to include scienter requirements.

Planned Parenthood, Sioux Falls Clinic, Dr. Buck Williams, and Women's Medical Services (collectively, "Planned Parenthood") cross-appeal the District Court's ruling that South Dakota may constitutionally require physicians to provide certain information to all abortion patients 24 hours before the abortion is performed. They also argue that the constitutional provisions of the South Dakota law are not severable from the unconstitutional criminal- and civil-penalties provisions, and that the District Court erred in not striking the challenged Act in its entirety.

We affirm in all respects.

---

[1] The Hon. Richard H. Battey, Chief Judge, United States District Court for the District of South Dakota.

I.

After South Dakota amended its abortion law in 1993, Planned Parenthood challenged the amended Act as facially unconstitutional. South Dakota's Act to Regulate the Performance of Abortion, S.D. Codified Laws Ann. § 34-23A-1 *et seq.*, amended by 1993 S.D. Laws ch. 249, restricts a woman's choice to have an abortion in several ways. Section 34-23A-7, the parental-notice provision, requires a physician or his agent to notify a pregnant minor's parent of the impending abortion 48 hours before the abortion is to be performed.[2] Section 34-23A-10.1, the

---

[2] Section 34-23A-7 provides:

No abortion may be performed upon an unemancipated minor or upon a female for whom a guardian has been appointed because of a finding of incompetency, until at least forty-eight hours after written notice of the pending operation has been delivered in the manner specified in this section. The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent. In lieu of such delivery, notice may be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee, which means a postal employee can only deliver the mail to the authorized addressee. If notice is made by certified mail, the time of delivery shall be deemed to occur at twelve o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

No notice is required under this section if:

(1) The attending physician certifies in the pregnant minor's medical record that, on the basis of the physician's good faith clinical judgment, a medical emergency exists that so complicates the

mandatory-information provision, provides that no abortion may be performed unless certain information is provided to the patient at least 24 hours beforehand.[3] Section

---

medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create a [sic] serious risk of substantial and irreversible impairment of a major bodily function and there is insufficient time to provide the required notice; or

(2) The person who is entitled to notice certifies in writing that he has been notified; or

(3) The pregnant minor declares, or provides information that indicates, that she is an abused or neglected child as defined in § 26-8A-2 and the attending physician has reported the alleged or suspected abuse or neglect as required in accordance with §§ 26-8A-3, 26-8A-6 and 28-6A-8 [sic] 26-8A-8. In such circumstances, the department of social services, the state's attorney and law enforcement officers to whom the report is made or referred for investigation or litigation shall maintain the confidentiality of the fact that she has sought or obtained an abortion and shall take all necessary steps to ensure that this information is not revealed to her parents.

[3] Section 34-23A-10.1 provides:

No abortion may be performed except with the voluntary and informed consent of the female upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if:

(1) The female is told the following by the physician who is to perform the abortion or by the referring physician, at least twenty-four hours before the abortion:

34-23A-22 provides for civil damages when an abortion is performed in violation of the medical-emergency

---

(a) The name of the physician who will perform the abortion;

(b) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility;

(c) The probable gestational age of the unborn child at the time the abortion is to be performed; and

(d) The medical risks associated with carrying her child to term;

(2) The female is informed, by telephone or in person, by the physician who is to perform the abortion, by the referring physician, or by an agent of either, at least twenty-four hours before the abortion:

(a) That medical assistance benefits may be available for prenatal care, childbirth and neonatal care;

(b) That the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion; and

(c) That she has the right to review the printed materials described in § 34-23A-10.3. The physician or his agent shall orally inform the female that the materials have been provided by the State of South Dakota. If the female chooses to view the materials, they shall either be given to her at least twenty-four hours before the abortion or mailed to her at least seventy-two hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee;

(3) The female certifies in writing, prior to the abortion, that the information described in subdivisions (1) and (2) of this section has been furnished her, and that she has been informed of her opportunity to review the information described in § 34-23A-10.3; and

provision,[4] the parental-notification provision, or the mandatory-information provision.[5] And Section

---

(4) Prior to the performance of the abortion, the physician who is to perform the abortion or his agent receives a copy of the written certification prescribed by subdivision (3).
The physician may provide the information prescribed in subdivision (1) by telephone without conducting a physical examination or tests of the patient, in which case the information required to be supplied may be based on facts supplied the physician by the female and whatever other relevant information is reasonably available to the physician.

[4] The medical-emergency provision, Section 34-23A-2.1, provides:

> If a medical emergency compels the performance of an abortion, the physician shall inform the female, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or that [sic, a] delay will create serious risk of substantial and irreversible impairment of a major bodily function.

[5] Section 34-23A-22 provides:
If any abortion occurs which is not in compliance with § 34-23A-2.1, 34-23A-7, [sic, or] 34-23A-10.1, the person upon whom such an abortion has been performed, and the parent of a minor child upon whom such an abortion was performed, or any of them, may maintain an action against the person who performed the abortion for ten thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained. Any person upon whom such an abortion has been attempted may maintain an action against the person who attempted to perform the abortion for five thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained.
If judgment is rendered in favor of the plaintiff in any such action, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against

34-23A-10.2 makes it a misdemeanor for a physician to violate the same provisions of the Act.[6]

Since 1973, the Supreme Court has recognized that women have a fundamental constitutional right to choose whether to terminate or continue their pregnancies. *Roe v. Wade*, 410 U.S. 113 (1973). This right is not absolute or unqualified; instead, the woman's right to decide whether or not to carry her pregnancy to term is balanced by the State's interest in protecting both her health and the potential life of the fetus. *Id.* at 162. After the fetus

---

> the defendant. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney's fee in favor of the defendant against the plaintiff.

[6] Section 34-23A-10.2 provides:
A physician who violates § 34-23A-2.1, 34-23A-7 [sic, or] 34-23A-10.1 is guilty of a Class 2 misdemeanor. The court in which a conviction of a violation of § 34-23A-2.1, 34-23A-7 or 34-23A-10.1 . . . shall report such conviction to the board of medical and osteopathic examiners.
No penalty may be assessed against the female upon whom the abortion is performed or attempted to be performed. No criminal penalty or civil liability for failure to comply with subsection 34-23A-10.1 (2) (c) or that portion of subsection 34-23A-10.1 (3) requiring a written certification that the woman has been informed of her opportunity to review the information referred to in subsection 34-23A-10.1 (2) (c) may be assessed unless the department of health has made the printed materials available at the time the physician or his agent is required to inform the female of her right to review them.

becomes viable – able to survive outside the womb – the State's interest in protecting its potential life becomes compelling enough in some circumstances to outweigh the woman's right to seek an abortion. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2804 (1992).[7] Before viability, however, "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Ibid.* The State can impose regulations designed to ensure that the woman makes a thoughtful and informed choice, but only if such regulations do not unduly burden her right to choose whether to abort. *Id.* at 2818.

Planned Parenthood claims that South Dakota regulations unduly burden a woman's right to choose. The State of South Dakota counters that its regulations merely ensure that the woman's choice is informed and thoughtful. On cross-motion for summary judgment, the District Court held that the parental-notice, civil-damages, and criminal-penalty provisions of South Dakota's abortion law place an undue – and thus unconstitutional – burden

---

[7] Our citations to *Casey*, unless otherwised [sic] noted, will be to the joint opinion of Justices O'Connor, Kennedy, and Souter. Although Justice Stevens and Justice Blackmun did not join the authors of the joint opinion in announcing the undue-burden test, they advocated an even stricter standard of review. *Casey*, 112 S.Ct. at 2838 (Stevens, J., concurring in part and dissenting in part (; *id.* at 2847) Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). The undue- burden test is thus the lowest common denominator. We view the joint opinion as the Supreme Court's definitive statement of the constitutional law on abortion.

on a woman's right to privacy, but that the mandatory-information provision does not. Both parties appeal.

II.

The critical issue in this case is a threshold one: what is the standard for a challenge to the facial constitutionality of an abortion law? The State would have us apply the test set out in *United States v. Salerno*, 481 U.S. 739 (1987), under which "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. Planned Parenthood, on the other hand, contends that the Supreme Court replaced the *Salerno* test in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992). Under *Casey*, it claims, an abortion law is unconstitutional on its face if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 2830.

The Supreme Court had previously applied *Salerno* in striking down facial challenges to abortion laws. See *Rust v. Sullivan*, 500 U.S. 173, 182-84 (1991); *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989). But a majority of the Court in *Casey* applied a different test – the one Planned Parenthood advocates here – in determining that Pennsylvania's spousal-notification law was facially invalid. Chief Justice Rehnquist highlighted this departure in his dissent in *Casey*, arguing that "it is insufficient for petitioners to show that the [spousal] notification provision 'might operate unconstitutionally under some conceivable set of circumstances.' " *Casey*,

112 S.Ct. at 2870 (quoting *Salerno*, 481 U.S. at 745). The majority made no response to this contention. Indeed, even though the joint opinion's authors "carefully reviewed and selectively departed from other earlier precedent," *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 529 (8th Cir. 1994), they did not expressly reject *Salerno*, even though applying a test incompatible with it.

Other circuits have split on the question whether *Casey* effectively overruled *Salerno* for abortion cases. The Third Circuit believes that the Supreme Court "set a new standard for facial challenges to pre-viability abortion laws." *Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (on remand) (dicta). The Fifth Circuit, however, refused to "interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes," and it continues to apply the *Salerno* standard. *Barnes v. Moore*, 970 F.2d 12, 14 & n.2 (5th Cir.), *cert. denied*, 113 S.Ct. 656 (1992).

Indeed, even the Justices of the Supreme Court dispute *Casey's* effect. Justice Scalia, joined by Chief Justice Rehnquist and Justice White, has stated that the only exception to the *Salerno* standard is for First Amendment cases, and "[t]he Court did not purport to change this well-established rule [in *Casey*]." *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 113 S.Ct. 633, 634 (1992) (Scalia, J., dissenting from the denial of certiorari). But Justice O'Connor, joined by Justice Souter, has emphasized that the Supreme Court in *Casey* "did not require petitioners to show that the provision would be invalid in all circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and

hence is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.' " *Fargo Women's Health Org. v. Schafer*, 113 S.Ct. 1668, 1669 (1993) (O'Connor, J., concurring in the denial of a stay pending appeal).

We cannot know how the Supreme Court will ultimately resolve this issue, but we must now decide it for ourselves. We were able to avoid the issue of which standard to follow in *Fargo Women's Health Organization v. Schafer*, *supra*, 18 F.3d 526. The result in that case would have been the same no matter which test was applied. *Id.* at 529-30, 532-33. Here, though, Planned Parenthood cannot meet the *Salerno* test, for circumstances exist under which the South Dakota law would be constitutional – its restrictions, for example, would be quite valid after a pregnancy had progressed past the point of viability. But Planned Parenthood could meet *Casey's* undue-burden test if, for example, the parental-notice law would be a substantial obstacle to a "large fraction" of minor women seeking pre-viability abortions. Thus, the standard we choose to follow today may well determine the outcome of this case.

We choose to follow what the Supreme Court actually did – rather than what it failed to say – and apply the undue-burden test. It is true that the Court did not expressly reject *Salerno's* application in abortion cases, but it is equally true that the Court did not apply *Salerno* in *Casey*. If it had, it would have had to uphold Pennsylvania's spousal-notification law, because that law imposed "almost no burden at all for the vast majority of women seeking abortions." *Casey*, 112 S.Ct. at 2829. Instead, the

Court held that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 2829. If the law will operate as a substantial obstacle to a woman's choice to undergo an abortion "in a large fraction of the cases in which [it] is relevant, . . . [i]t is an undue burden, and therefore invalid." *Id.* at 2830.

We believe the Court effectively overruled *Salerno* for facial challenges to abortion statutes. We will therefore apply the *Casey* standard to determine if South Dakota's Act to Regulate the Performance of Abortion is constitutional on its face.

III.

We turn first to the Act's parental-notice provision, S.D.C.L. § 34-23A-7. Under that provision, physicians must notify one of a pregnant minor's parents of the intended abortion at least 48 hours before performing the abortion unless: (1) the physician has certified that a medical emergency exists; (2) the parent has certified that he or she has been notified; or (3) the physician has reported to the appropriate authorities that the minor has declared or indicated that she is an abused or neglected child. A physician who performs an abortion on a minor without notifying her parent or meeting one of these exceptions is subject to both criminal and civil penalties.

The District Court began its analysis of the constitutionality of this provision by looking to prior Supreme

Court cases involving parental-notice and parental-consent laws. It found no case on point, but it concluded that "[s]tate and parental interests must yield to the constitutional right of a mature minor, or of an immature minor whose best interests are contrary to parental involvement, to obtain an abortion without consulting or notifying the parent or parents." *Planned Parenthood v. Miller*, 860 F.Supp. 1409, 1415 (D.S.D. 1994). The District Court determined that a minor is entitled to a procedure designed to bypass the parental-notice requirement by allowing the minor to proceed with the abortion if she can show that she has the maturity to make her decision independently of her parent's advice or, even if she lacks such maturity, that having an abortion without notifying her parents would be in her best interests. *Ibid.* Since the South Dakota law lacks such a bypass procedure, the District Court held that it was unconstitutional. *Id.* at 1416.

The State argues that parental-notice laws do not need a bypass procedure to be constitutional. It argues that the Supreme Court has required bypass procedures only for consent statutes and that five Justices have agreed that "notice statutes are not equivalent to consent statutes." *Ohio v. Akron Center for Reproductive Health (Akron II)*, 497 U.S. 502, 511 (1990). Planned Parenthood counters that even though notice and consent statutes are not equivalent, they may, as a practical matter, impose the same burden. If that burden is undue under consent statutes without a bypass, then it should be undue under notice statutes without a bypass.

The State responds that even if a parental-notice provision needs a bypass to be constitutional, its "doctor

bypass" for abused and neglected minors should suffice. Indeed, the State claims that its bypass is less of a burden than the judicial bypass required for consent statutes. Planned Parenthood disputes that claim and points out that South Dakota's bypass for abused and neglected minors does not provide an alternative to parental notice for mature or "best interest" minors who have not been mistreated. We agree with Planned Parenthood on this point.

A.

We begin, as the District Court did, with a review of Supreme Court precedent. "An undue burden exists, and therefore a provision of law is invalid, if this purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 112 S.Ct. at 2821. The Court has established that a parental-*consent* requirement is not an undue burden for minors seeking abortions so long as the minor has the opportunity to avoid the requirement by demonstrating that she is mature or that an abortion is in her best interests. *Bellotti v. Baird*, 443 U.S. 622, 651 (1979) (plurality). See also *City of Akron v. Akron Center for Reproductive Health*, (*Akron I*), 462 U.S. 416, 440 (1983) (following *Bellotti* by invalidating a consent statute that made "a blanket determination that all minors under the age of 15 are too immature to make [an abortion] decision or that an abortion never may be in the minor's best interests without parental approval"). Under *Bellotti*, consent statutes must have an expeditious, anonymous bypass procedure that allows a minor to show either that she has the maturity to make her own abortion decision or, even if

she is immature, that the desired abortion would be in her best interests. *Bellotti*, 443 U.S. at 643-44; *Akron II*, 497 U.S. at 511-13 (reviewing criteria for bypass). Without that opportunity, the consent requirement unduly burdens the minor's right to choose.

As for notice requirements, the Supreme Court has established that the State may require parental notice for immature minors who cannot show that an abortion would be in their best interests. *H.L. v. Matheson*, 450 U.S. 398, 409 (1981); *id.* at 414 (Powell, J., concurring). On the other hand, the Court has held that statute requiring notice to *both* parents is unconstitutional without a bypass procedure, but constitutional with one.[8] *Hodgson v. Minnesota*, 497 U.S. 417, 461 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part); *id.* at 481 (Kennedy, J., concurring in the judgment in part and dissenting in part). As *Hodgson* made clear, some of the Justices would hold that requiring one-parent notice

---

[8] The Court was sharply divided in *Hodgson*, with four Justices holding that a two-parent notice requirement is constitutional with or without bypass, four Justices holding that it is unconstitutional with or without bypass, and one Justice – Justice O'Connor – holding that it is unconstitutional without a bypass, but constitutional with one. *Id.* at 479 (Scalia, J., concurring in the judgment in part and dissenting in part) (summarizing the holdings). Justice O'Connor held that the two-parent notice requirement, which required the minor to notify both parents even when one parent agreed that the other should not be notified, unduly interfered in internal family operations, but she found that this problem "simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure." *Id.* at 461 (O'Connor, J., concurring in part and concurring in the judgment in part).

is unconstitutional even with a bypass procedure, while others would hold that a more restrictive two-parent notice requirement is constitutional even without a bypass. *Id.* at 462 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 489 (Kennedy, J., concurring in the judgment in part and dissenting in part). In short, the Supreme Court has yet to decide whether a mature or "best interest" minor is unduly burdened when a State requires her physician to notify one of her parents before performing the abortion.

To resolve that issue, we first consider why requiring parental notice – or, for that matter, parental consent – is *not* an undue burden on immature minors who cannot show that an abortion would be in their best interests. After all, "many parents hold strong views on the subject of abortion, and your pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct . . . an abortion. . . ." *Bellotti*, 443 U.S. at 647. Notifying the parent of the daughter's intentions 48 hours before the abortion can be performed gives the parent the opportunity to obstruct the daughter's choice, just as requiring consent gives parents the tool with which to do so. The possibility of such obstruction – or even attempted obstruction – might be considered a substantial obstacle for a large fraction of minors seeking pre-viability abortions. *Cf. Casey*, 112 S.Ct. at 2829-30 (holding that spousal-notice requirement imposed substantial obstacle for a large fraction of married women seeking abortions who did not wish to notify their husbands of their intentions because of the very real possibility that their husbands would try to obstruct the

abortion). Why, then, has the Court found that immature minors are not unduly burdened by this obstacle?

The answer, of course, is that they are minors, and States may impose requirements on immature minors that it may not impose on adults. *Akron I*, 462 U.S. at 427 n.10. Immature minors are simply not capable of making the informed, independent decisions that adults can. See *id.*; *Bellotti*, 443 U.S. at 635-36; *Hodgson*, 497 U.S. at 458-59 (O'Connor, J., concurring in part and concurring in the judgment in part). "As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor." *Bellotti*, 443 U.S. at 640 (quoted by Justice O'Connor in *Hodgson*, 497 U.S. at 458).

The State can thus give parents a chance – or even a tool – to obstruct their immature, non-best-interests daughter's decision to have an abortion without violating the Constitution. The State runs afoul of the Constitution, however, when it attempts to give that same power to parents of mature daughters capable of making their own informed choices. *Bellotti*, 443 U.S. at 643-44 & n.23. Because maturity does not always correspond to the age of majority, minors must have the chance to demonstrate their maturity. *Id.* at 650. See also *id.* at 644 n.23 ("[T]he peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors."). By showing that they are capable of mature, informed consideration, such minors establish that the State has no legitimate reason for imposing a

restriction on their liberty interests that it could not impose on adult women.

As for immature minors whose best interests would be served by having an abortion, "the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child." *Hodgson*, 497 U.S. at 454. States may generally require the parent's involvement in an immature minor's abortion decision because it is presumed that a parent will act in the minor's best interest. But if the minor can show that an abortion without notification would be in her best interest, then the State has no further reason for requiring such notice.

For both mature and "best interest" minors, then, the State has no legitimate interest in imposing a parental-notice requirement with the purpose or effect of placing a substantial obstacle in their paths when they seek previability abortions. For this reason, we hold that the State may not impose a parental-notice requirement without also providing a confidential, expeditious mechanism by which mature and "best interest" minors can avoid it. In short, parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass. We do not think that requiring notice to only one parent avoids this problem. Such a requirement still places a substantial obstacle in the way of a mature or best-interests minor's right to choose.

B.

The State claims that its exception for abused and neglected minors satisfies any need for a bypass procedure. That exception allows an abortion to be performed on a pregnant minor without notice to a parent if her physician has reported to the appropriate authorities that the minor has indicated that she is "abused or neglected" as defined by S.D.C.L. § 26-8A-2.[9] The State

---

[9] Section 26-8A-2 defines an "abused or neglected child" as a child:

(1) Whose parent, guardian, or custodian has abandoned the child or has subjected the child to mistreatment or abuse;
(2) Who lacks proper parental care through [sic,] actions or omissions of the child's parent, guardian or custodian;
(3) Whose environment is injurious to the child's welfare;
(4) Whose parent, guardian or custodian fails or refuses to provide proper or necessary subsistence, supervision, education, medical care or any other care necessary for the child's health, guidance or weil-being;
(5) Who is homeless, without proper care or not domiciled with the child's parent, guardian or custodian through no fault of the child's parent, guardian or custodian;
(6) Who is threatened with substantial harm;
(7) Who has sustained emotional harm or mental injury as indicated by an injury to the child's intellectual or psychological capacity evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance and behavior, with due regard to the child's culture; or

contends that this exception is enough to salvage the constitutionality of its notice provision.

We disagree. South Dakota's exception for abused and neglected minors does not save the notice provision because it does not provide a mechanism by which minors can avoid parental notice by demonstrating to an independent decisionmaker that they are mature or that an abortion would be in their best interests. And while the abuse exception is expeditious – the abortion may be performed 24 hours after the abuse has been reported – it fails to preserve the minor's anonymity or even confidentiality.

1.

South Dakota's "bypass" for abused and neglected minors falls short of protecting the confidentiality of the minor's decision to have an abortion. The statute provides that "the department of social services, the state's attorney and law enforcement officers . . . shall maintain the confidentiality of the fact that she has sought or obtained an abortion." S.D.C.L. § 34-23A-7(3). Nothing, however, prevents a court from ordering production of that information during discovery in a later abuse proceeding. South Dakota law provides numerous opportunities for a parent accused of child abuse to obtain the physician's report of the daughter's abuse. See S.D.C.L.

---

(8) Who is subject to sexual abuse, sexual molestation or sexual exploitation by the child's parent, guardian, custodian or any other person responsible for the child's care.

§ 26-7A-29 (juvenile court may release information on a child to the child's parent); § 26-7A-37 (child's parent authorized to inspect all records of court proceedings, including reports of the Department of Social Services); § 26-7A-58 (respondent parent may inspect or copy any relevant written or recorded statement made by child); § 26-7A-60 (respondent parent may copy any document used in the state's case). In a state where there is only one doctor who performs abortions, the minor's decision to seek an abortion would be revealed merely by the name of the reporting physician. That decision would certainly come to light when the State called the doctor who reported the abuse to testify in the abuse proceeding. In practice, it seems, South Dakota's abuse exception will sometimes result in parental notification, even if after-the-fact. *Cf. Hodgson*, 497 U.S. at 460 (O'Connor, J.) (holding that abuse exception was not a viable alternative because the minor's reluctance to report abuse combined with "the likelihood that invoking the abuse exception . . . will result in notice," made the abuse exception "less than effectual").

2.

South Dakota's abuse exception also fails to provide the minor access to an independent decisionmaker. See *Planned Parenthood Assoc. of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 493 n.20 (1983) (indicating that a minor should have access to an independent decisionmaker). The State correctly points out that the Supreme Court has not required that bypass procedures be judicial. *Id.* (declining to decide "whether a qualified and

independent nonjudicial decisionmaker would be appropriate"). In establishing the criteria for bypass procedures, the plurality in *Bellotti* noted:

> We do not suggest . . . that a State choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or officer. Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction.

Bellotti, 443 U.S. at 643 n.22.

Even if bypass procedures can be conducted by nonjudicial decisionmakers, a point we need not decide, such decisionmakers must at least be independent. We agree with the District Court that "[a]n effective, alternative bypass procedure would place the decision in the hands of a neutral and detached agency . . . which would be able to take into consideration the competing interests involved in the abortion decision." *Planned Parenthood*, 860 F. Supp. at 1416. And as the District Court noted, "[t]he physician performing the abortion can hardly be said to be the neutral and detached agency." *Ibid.*

3.

The most fundamental flaw in South Dakota's abuse exception is its failure to allow a neutral decisionmaker to decide, on a case-by-case basis, whether a minor is mature enough to make her own decision or whether an abortion is in her best interests. *Akron II*, 497 U.S. at 522 (Stevens, J.) ("Although it need not take the form of a judicial bypass, the State must provide an adequate

mechanism for cases in which the minor is mature or notice would not be in her best interests."). The whole point of a bypass procedure is to allow the minor to show that the State's justification for requiring parental notice – that minors are immature and in need of guidance for their own best interests – does not apply to her, either because she is mature or because an abortion is actually in her best interest.

South Dakota's "abused or neglected child" exception does not allow minors this opportunity. The State responds that Planned Parenthood has not shown the existence of a "large fraction" of minors in need of this opportunity. It contends that parental notice imposes no burden on mature minors because any truly mature minor would be willing to inform her parent of her intentions. This is a specious argument. Even if a minor is mature and willing to tell her parent, if need be, about her pregnancy and intent to obtain an abortion, she may have good reasons for deciding not to – such as choosing to wait until a more appropriate moment, wishing to avoid causing unnecessary pain, or desiring to reduce potential strife by presenting a fait accompli – just as an adult woman might have good reasons for deciding not to tell her spouse or parent. If a minor can demonstrate that she is mature, the State has no legitimate reason for imposing liberty restrictions upon her that it may not impose on an adult.

The State also argues that Planned Parenthood has failed to prove the existence of minors who could show that an abortion is in their best interests yet who do not fall under South Dakota's abuse exception. On the contrary, Planned Parenthood has submitted affidavits citing

studies that show that a stressful, but non-abusive, parent-child relationship can become abusive or neglectful after the parent learns of the daughter's pregnancy or desire to have an abortion.[10] Declaration of Mary Jones, ¶ 5; Council on Ethical and Judicial Affairs, American Medical Association, *Mandatory Parental Consent to Abortion*, 269 JAMA 82, 83 (1993). An abortion without parental notification might be in this minor's best interest, but she would not qualify for South Dakota's abuse exception. Planned Parenthood also points out that non-abusive parents who differ from their daughters on religious or moral grounds over abortion may be prepared to prevent their daughters from obtaining abortions even when those abortions are in the daughters' best interests. *Bellotti*, 443 U.S. at 647; Declaration of Buck Williams, ¶ 28 (honor-student minor feared parents ideologically opposed to abortion would prevent her from having abortion; when father learned daughter was at clinic, he assaulted staff members and forced daughter to leave); Declaration of Gail Kelly, ¶ 8; Declaration of Carol Knudtson, ¶ 7; Declaration of Joan Williams, ¶ 19. Failing to provide a bypass option for these minors undermines the State's justification for requiring notice in the first place: to ensure that the minors' best interests are served.

Finally, Planned Parenthood has submitted numerous affidavits demonstrating that many minors who are

---

[10] It is no answer to say that the minor could simply notify her other parent. Roughly eighteen per cent. of South Dakota's minors live in single-parent homes; many of them, as a practical matter, have only one parent to notify. Declaration of De Vee Dykstra, Exhibit E (1990 census information). See *Hodgson*, 497 U.S. at 437-38.

abused will not be able to use the abuse exception. The abuser often instills secrecy in the child, to such an extent that victims have trouble talking about the abuse years or even decades later. Knudtson Declaration, ¶ 8; Jones Declaration ¶¶ 3, 4. *Cf. Casey*, 112 S.Ct. at 2827. Many children blame themselves for the abuse and are very protective of the abusive parent. Knudtson Declaration, ¶ 8; Jones Declaration, ¶ 3; Declaration of Penny Virchow, ¶ 9. A minor faced with the untenable choice of turning in her parent or foregoing an abortion will often delay her decision until it is too late; she may even commit suicide rather than choose between two such agonizing choices. Jones Declaration, ¶ 4. Even if South Dakota's exception were otherwise acceptable, its failure to provide an alternative procedure for these minors would doom it.

Planned Parenthood has shown that a large fraction of minors seeking pre-viability abortions would be unduly burdened by South Dakota's parental-notice statute, despite its abuse exception. We affirm the District Court and hold that S.D.C.L. § 34-23A-7 is constitutional on its face.

IV.

The District Court also struck the civil-damages and criminal-penalty provisions of the Act, S.D.C.L. §§ 34-23A-10.2 and 34-23A-22. Section 34-23A-10.2 makes a physician's violation of the parental-notice, mandatory-information, or medical-emergency provisions a Class 2 misdemeanor, punishable by a 30-day imprisonment, a $200 fine, and a report of the conviction to the board of

medical examiners. Section 34-23A-22 allows a cause of action "for ten thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained" against a physician who violates the same provisions.

Neither section contains a scienter requirement on its face. The State, contending that South Dakota courts would nonetheless read a scienter requirement into each section, asked the District Court to certify the issue of the interpretation of the statutes to the South Dakota Supreme Court. The District Court declined to do so, finding that the State's claim of implied scienter "is of little comfort to a physician who wishes to conform his conduct to the law." *Planned Parenthood*, 860 F.Supp. at 1420. The Court held that the criminal provision's lack of mens rea made it unconstitutionally vague, creating a "chilling effect" so that physicians, who cannot guess the standard under which the courts will judge their conduct, would choose not to act at all. *Ibid*. It also held that the strict liability of the civil-damages section unduly burdens a woman's decision to have an abortion by making it unlikely that any physician would be willing to perform it. *Id*. at 1418.

The State appeals these holdings, asking us to certify the interpretation of these provisions to the South Dakota Supreme Court. We find no need to do so. Certification to a state court is appropriate when the state court's construction of an uncertain state law could make resolution of federal constitutional questions unnecessary. See *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 211-12 (1960). Certification is not necessary, though, where the statute is

"neither ambiguous nor obviously susceptible of a limiting construction." *Houston v. Hill*, 482 U.S. 451, 471 (1987). See also *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 (1984) (no need to abstain when Act unambiguous and no other provision of state law suggests that Act "does not mean exactly what it says"); *Colorado River Water Const. Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976) ("[T]he opportunity to avoid decision of a constitutional question does not alone justify abstention by a federal court.").

A.

On its face, the criminal-penalty provision is unambiguous: it simply states that performing an abortion in violation of certain provisions of the Act is a crime. There is no need for construction when a statute's language is clear and unambiguous, see *US West v. Public Utilities Comm'n*, 505 N.W.2d 115, 123 (S.D. 1993), but courts must read statutes as constitutional whenever possible. *State v. Stone*, 467 N.W.2d 905, 906 (S.D. 1991). Would the South Dakota Supreme Court construe this unambiguous statute to have a scienter requirement in order to save it?

We think not. The South Dakota Supreme Court has established a test for when it will undertake to read a scienter requirement into a statute that completely lacks one. *State v. Barr*, 237 N.W.2d 888, 891-93 (S.D. 1976); *Stone*, 467 N.W.2d at 906. "Whether criminal intent or guilty knowledge is an essential element of a statutory offense is to be determined by the language of the act in connection with its manifest purpose and design." *State v. Nagel*, 279 N.W.2d 911, 915 (S.D. 1979). If the statute's

language lacks any indication of mens rea, the South Dakota Supreme Court looks at what courts in other jurisdictions have done with similar statutes, particularly when there is a need to maintain uniformity; it then determines whether lesser crimes include a scienter element, making the lack of scienter in the greater crime anomalous; and finally, it looks at whether the State contends that there is a scienter element in the statute. *Barr*, 237 N.W.2d at 891-93; *Stone*, 467 N.W.2d at 906.

Planned Parenthood argues that the South Dakota Supreme Court would undertake this analysis only for statutes modeled on uniform acts. There is some support for this: *Barr* and *Stone* are the only cases in which the South Dakota Supreme Court has read a scienter requirement into a statute completely lacking one, and both involved uniform narcotic laws. We need not decide this issue, however, for the criminal provision here cannot pass the state Supreme Court's test even if that Court were to apply it.

For the first step in the analysis, the South Dakota Supreme Court would look at what other courts have done with similar provisions. In *Barr* and *Stone*, the Supreme Court observed that the courts in other jurisdictions with similar statutes uniformly read a scienter element into the scienter-less statute. *Barr*, 237 N.W.2d at 891; *Stone*, 467 N.W.2d at 906. Here, however, no such body of law exists.

The State points us to *Baird v. Attorney General*, 360 N.E.2d 288 (Mass. 1977), a case in which the Massachusetts Supreme Court held that a physician could claim a good-faith, reasonable mistake as to a minor's age when

prosecuted for performing an abortion on a minor without her parent's consent, even though the abortion statute contained no scienter element. That court, however, found a scienter element in the state's general law on parental consent for medical care, which allowed physicians to assert a good-faith mistake as to the minor's age as a defense. *Id.* at 302. South Dakota has no general law on medical consent for minors.

Our Court also looked to an outside statute to resolve a case involving an abortion statute that had a scienter element for only part of the crime. In *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981), *aff'd in part, rev'd in part*, 462 U.S. 476 (1983), we found that a Missouri abortion statute which proscribed "knowingly perform[ing]" an abortion in violation of its provisions did not lack a scienter requirement because Missouri had a statute providing that the culpable mental state – knowingly – extended to each material element of the crime.[11] *Ashcroft*, 655 F.2d at 861-62.

---

[11] Along the same lines, the State refers us to *United States v. X-Citement Video*, 115 S. Ct. 464 (1994), a recent Supreme Court decision holding that the scienter element contained in the first paragraph of a statutory section applied to all of the subparagraphs. *Cf. Colautti v. Franklin*, 439 U.S. 379, 394-95 (1979) (refusing to extend the scienter requirements regarding intention to cause the death of the fetus to the determination of viability); *Schulte v. Douglas*, 567 F.Supp. 522, 527-28 (D.Neb. 1981), *aff'd sub nom. Womens Service, P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983) (per curiam) (refusing to extend intent provision for the determination of viability to the subsequent section providing an exception for maternal health). Here the criminal-penalty provision contains no scienter requirement at all. There is thus nothing for us to extend.

The courts in these cases, however, had another statute available to provide scienter. We have not found – and the parties have not cited – any case where a court read a scienter requirement into an abortion statute that, on its face, contained no such element when no secondary statute providing scienter existed. There is thus no body of law to persuade the South Dakota Supreme Court to read beyond the plain language of the statute.

The statute here would also fail the second step of the *Barr* analysis. In *Barr* and *Stone*, the South Dakota Supreme Court looked at similar crimes with lesser penalties that contained a scienter element and found that "it would be anomalous to hold that the legislature intended to require a lesser burden of proof . . . in those offenses carrying the more serious . . . penalty." *Barr*, 237 N.W.2d at 891. On the other hand, the Court also noted that, "[w]ere it not for the apparently uniform holdings of other courts . . . that knowledge is an element" in the statute, the legislature's careful enumeration of scienter elements in related crimes could also lead to the opposite conclusion: that the legislature had deliberately omitted such an element in the statute before it. *Id.* at 892. After all, "[t]he intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used." *US West*, 505 N.W.2d at 123.

Here, of course, there are no "apparently uniform holdings of other courts" that abortion statutes contain implicit scienter elements. There are also no "lesser crimes" involving violation of the abortion Act. The State argues that an anomaly exists here because certain provisions of the Act to Regulate the Performance of Abortion

cannot be violated without a culpable mental state. Thus, it contends, the Act's definition of "medical emergency" as based on the physician's good-faith clinical judgment, S.D.C.L. § 34-23A-7(1), and of "abortion" as the intentional termination of a pregnancy with knowledge that the death of the fetus will result, S.D.C.L. § 34-23A-1(1), is inconsistent with the lack of scienter in the remainder of the Act. We think it likely that the South Dakota Supreme Court would find that these provisions demonstrate the legislature's intent not to require scienter for the Act's other provisions. See *Nagel*, 279 N.W.2d at 916 (fact that another section of the same securities chapter required intent demonstrated that legislature purposefully omitted scienter requirement from securities law at issue).

The third step of the South Dakota Supreme Court's analysis would be easy to meet, since the State admits that the statute has no scienter element. The State maintains instead that state courts would read such an element into the statute, despite its plain language. That seems highly unlikely, given that this third step is the only part of the *Barr* analysis that this statute could pass. The Attorney General's view of the statute is surely not enough in itself to justify reading text into a statute where no such text exists.

We conclude that the South Dakota Supreme Court would not read a scienter element into the plain language of this statute. Since the statute is unambiguous and not easily susceptible to a limiting construction, we find no reason to certify this issue.

We also hold that, without a scienter requirement, this strict criminal-liability statute will have a "profound

chilling effect on the willingness of physicians to perform abortions." *Colautti*, 439 U.S. at 396; *Ashcroft*, 655 F.2d at 861. It thus creates a substantial obstacle to a woman's right to have a pre-viability abortion in the state of South Dakota. We affirm the District Court's decision to strike Section 34-23A-10.2 as unconstitutional.

B.

The civil-damages provision is similarly unambiguous. It simply provides for the trebling of actual damages and a specified amount of punitive damages upon a showing that the defendant violated one of the Act's provisions. This is a strict-liability statute that fixes the amount of damages, and we do not believe that the South Dakota Supreme Court would rule any differently.

The State argues that the statute must be read in conjunction with S.D.C.L. § 21-1-4.1, which requires a court to determine that there is a reasonable basis to believe that the defendant acted with either presumed or actual malice before the issue of punitive damages can be submitted to the trier of fact. *Kjerstad v. Ravellette Publications*, 517 N.W.2d 419, 425 (S.D. 1994); *Dahl v. Sittner*, 474 N.W.2d 897, 900-901 (S.D. 1991). But Section 21-1-4.1 does not add a scienter requirement to Section 34-23A-22. Instead, it creates a procedural threshold that the plaintiff must pass before the court will submit the issue of punitive damages to the jury. *Dahl*, 474 N.W.2d at 902. Once that threshold is passed, the statute "leaves unchanged the substantive nature of the availability of punitive damages." *Ibid.*

Section 21-1-4.1 ensures that there is enough culpability to warrant submitting the issue of punitive damages to the jury, but it does nothing to ensure that the jury itself must find any culpability before awarding punitive damages. *Ibid.* The trier of fact determines the appropriateness of punitive damages under the requirements of the statute that provides for them – in this case, the strict-liability standard of the Act's civil-damages section. *Ibid.* (noting that Section 21-1-4.1 "does not alter the standard of proof required to recover on a punitive damages claim"). Under that standard, it is irrelevant whether the defendant's conduct was actually willful, wanton, or malicious. To award punitive damages under Section 34-23A-22, the jury need find only that the defendant violated the parental-notice, mandatory-information, or medical-emergency provisions of the Act. And once the jury decides to award punitive damages, it has no discretion over the amount of damages to award: the statute fixes it as $10,000.

The State claims that the statute creates a $10,000 cap, rather than a $10,000 award, but that argument is belied by the language of the statute. The civil-damages provision states that the plaintiff "may maintain an action . . . *for* ten thousand dollars in punitive damages." S.D.C.L. § 34-23A-22 (emphasis added). "For" denotes equivalency; one would hardly argue that a "bill for $50" establishes a ceiling rather than the exact amount due. Moreover, a review of other South Dakota statutes reveals that the legislature knows how to set a cap on punitive damages when it wants to. See S.D.C.L. § 23A-28B-35 (allowing punitive damages for a fraudulent claim to the crime victims' compensation board of "not more than double the amount of damages the state has sustained");

§ 30-17-8 (providing for punitive damages "not to exceed the value" of the decedent's estate); § 37-29-3 (providing for punitive damages for willful and malicious trademark appropriation "not exceeding twice" other damages); § 43-32-24 (allowing punitive damages for bad faith retention of rent, "not to exceed $200"). See also § 21-3-11 (providing that damages in medical malpractice action may not exceed $1,000,000).

A punitive damage award based on strict liability and fixed by statute fails to ensure that "[t]he allowance and amount of punitive damages turns on the particular facts of each case." *Wangen v. Knudsen*, 428 N.W.2d 242, 246 (S.D. 1988). A jury usually has the discretion to determine whether the facts of the case warrant an award of punitive damages and, if so, what amount would serve to deter and punish the wrongdoer. Indeed, the South Dakota Supreme Court has established five factors that the trier of fact should consider in determining the amount of punitive damages to award. *Wangen*, 428 N.W.2d at 246. Section 34-23A-22, however, does not allow the trier of fact to determine the amount of punitive damages to impose for a violation of the abortion Act. The five factors would never come into play under this statute, leaving nothing to ensure that the award has "some understandable relationship to compensatory damages" and is "not grossly out of proportion to the severity of the offense." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

Since the civil-damages provision allows punitive damages on a strict-liability basis, it is quite possible that the statutorily fixed $10,000 award will be grossly out of proportion to the severity of the offense. A physician who

performs an abortion on a minor who he reasonably believes is more than eighteen years old is strictly liable for his conduct, as is a physician who in good faith supplies the mandatory information over the phone to the wrong person. The potential civil liability for even good-faith, reasonable mistakes is more than enough to chill the willingness of physicians to perform abortions in South Dakota. See *Colautti*, 439 U.S. at 396. We therefore hold that Section 34-23A-22 is an undue burden on a woman's right to choose whether to terminate her pre-viability pregnancy.

V.

Planned Parenthood cross-appeals the District Court's decision to uphold South Dakota's mandatory-information provision, S.D.C.L. § 34-23A-10.1. That provision requires that the patient be told the name of the doctor who will perform the abortion, the probable gestational age of the fetus, and the medical risks of both continuing and terminating the pregnancy. It also requires that she be informed that medical assistance benefits may be available for prenatal care and childbirth, that the father would be liable for child support, and that printed materials are available for her to review about fetal development, adoption services, and public-assistance benefits. All of this information must be provided to the patient 24 hours before the abortion, and she must certify in writing that she received it. The only exception to the mandatory-information provision is for a medical emergency.

South Dakota's provision is substantially similar to provisions upheld by the Supreme Court in *Casey* and by this Court in *Fargo Women's Health Organization v. Schafer*. *Casey*, 112 S.Ct. at 2822-26; *Schafer*, 18 F.3d at 532-34. The Pennsylvania provision approved of in *Casey* provided two exceptions not found here: the information on the father's liability for child support could be omitted for rape victims, and other information could be omitted if the physician reasonably believed that providing the information could severely hurt the patient's physical or mental health. 19 Pa. Cons. Stat. Ann. §§ 3205(a)(2)(iii), 3205(c); *Casey*, 112 S.Ct. at 2824. Planned Parenthood contends that the lack of such exceptions in the South Dakota law makes it unconstitutional on its face.

We decided this issue in *Fargo Women's Health Organization v. Schafer*, where we upheld a North Dakota law similar to the one at issue here. *Schafer*, 18 F.3d at 532-34. The North Dakota law also lacked the particular exceptions provided by Pennsylvania, but we held that North Dakota's medical-emergency exception allowed it to pass constitutional muster. *Id.* at 533. Because South Dakota's mandatory-information provision and medical-emergency exception are virtually identical to those we upheld in *Schafer*, Planned Parenthood's argument that they are unconstitutional must fail. Planned Parenthood argues that *Schafer* was wrongly decided, but, as we explained to counsel at the oral argument, this panel is bound by *Schafer*. Under our long-standing practice, only the en banc Court can overrule a prior panel opinion.

VI.

Planned Parenthood also argues that the constitutional portions of South Dakota's Act to Regulate the Performance of Abortion are inextricably intertwined with the unconstitutional penalty provisions. It contends that the prohibition of conduct and the penalties for violating that prohibition are mutually dependent; one cannot stand without the other, despite the Act's severability provision. In short, it argues that if the civil and criminal penalties are unconstitutional, then the entire Act must be struck.

We do not believe that our holding that the criminal and civil penalties are unconstitutional invalidates the entire Act. South Dakota can enforce the constitutional portions of the Act under its pre-existing law. S.D.C.L. § 36-4-30, for example, allows the State to cancel, revoke, or suspend the license of a physician who engages in conduct "unbecoming a person's license to practice medicine." S.D.C.L. § 36-4-30(22). As an intentional violation of the abortion law would presumably be conduct unbecoming to a license to practice medicine, the State can enforce the remaining portions of the Act to Regulate the Performance of Abortion by revoking the medical license of any practitioner who willfully violates them. We therefore decline to strike the Act in its entirety.

VII.

We hold that S.D.C.L. § 34-23A-7, the parental-notice provision of the Act to Regulate the Performance of Abortion, is unconstitutional on its face because it unduly burdens the liberty interests of a large number of mature

minors and of immature minors whose best interests would be served by allowing an abortion without parental notification. We also conclude §§ 34-23A-10.2 and 34-23A-22, the criminal- and civil-penalty provisions of the Act, are unconstitutional because their strict liability chills the willingness of physicians to provide abortions in the state, and thus unduly burdens the right to have a pre-viability abortion. Finally, we uphold Section 34-23A-10.1, the mandatory-information provision, under the authority of *Fargo Women's Health Organization v. Schafer*, 18 F.3d 526 (8th Cir. 1994).

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Filed June 16, 1993
William F. Clayton, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

PLANNED PARENTHOOD, SIOUX FALLS CLINIC; BUCK J. WILLIAMS, M.D., and WOMEN'S MEDICAL SERVICES, P.C.,	)	CIV. 93-3033
Plaintiffs,	)	ORDER
vs.	)	
WALTER D. MILLER, Governor, and MARK W. BARNETT, Attorney General, in their official capacities,	)	
Defendants.	)	

On June 15, 1993, plaintiffs filed suit in the above-entitled action and moved the court to issue a temporary restraining order and/or a preliminary injunction against enforcement of South Dakota's new law regulating abortions, HB 1131, amending S.D.C.L. §§ 34-23A-1, *et seq.* (hereinafter referred to as "the Act"). The Act is scheduled to take effect on July 1, 1993. Plaintiffs claim that certain provisions of the Act are unconstitutional and seek injunctive relief against its enforcement until the final determination of the merits of this action.

Challenged Provisions of the Act

Plaintiffs first challenge the twenty-four hour delay required before an abortion may be performed. At least twenty-four hours before performing an abortion, the physician who will perform the abortion, or the referring physician, must provide the patient with certain information. S.D.C.L. § 34-23A-10.1 (Supp. 1993). This information includes: the name of the physician who will perform the abortion, particular medical risks associated with the procedure, the probable gestational age of the unborn child at the time of the abortion, and medical risks associated with carrying the pregnancy to term. *Id.* Further, at least twenty-four hours before the abortion, the physician who will perform the abortion, the referring physician, or an agent of either, must also inform the patient concerning: the availability of medicall assistance benefits for prenatal care, childbirth, and neonatal care; liability of the father to assist in supporting the child; the patient's right to review certain printed material developed by the state regarding alternatives to abortion and descriptions of fetal development. *Id.*; S.D.C.L. § 34-23A-10.3 (Supp. 1993).

The Act provides an exception to this twenty-four hour delay in the case of medical emergency. S.D.C.L. § 34-23A-10.1. The Act also states that the required information may be given to the patient telephonically, without a physical examination of the patient. *Id.* Plaintiffs contend that this twenty-four hour delay provision violates the Fourteenth Amendment by placing an "undue burden" on a woman's right to abortion.

Plaintiffs also challenge the parental notification provision. The parental notification provision prohibits the performance of an abortion upon an unemancipated minor or an incompetent adult woman until at least forty-eight hours after written notice to a parent or guardian of the patient. S.D.C.L. § 34-23A-7 (Supp. 1993). The Act allows three exceptions to the parental notification requirement: (1) medical emergencies; (2) the parent or guardian certifies, in writing, that he or she has been notified; or (3), the patient declares that she is an abused or neglected child, and the physician has reported the abuse to the appropriate state agency, as required by South Dakota law. *Id.*

Plaintiffs argue that the parental notification provision is unconstitutional because it lacks any "judicial bypass" mechanism. A judicial bypass mechanism allows a minor to receive an abortion without notification to her parent if she is mature enough to independently make her decision concerning abortion or if notification of her parents would not be in her best interests. Plaintiffs also express concern about certain provisions providing for the civil liability and criminal culpability of those who violate the Act's provisions. Based upon their arguments that the Act is unconstitutional, plaintiffs seek a temporary restraining order and/or a preliminary injunction.

Standards for Injunctive Relief

The standards governing the issuance of a temporary restraining order or a preliminary injunction include: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that

granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (preliminary injunction); *S.B. McLaughlin & Co. v. Tudor Oaks Condominium Project*, 877 F.2d 707, 708 (8th Cir. 1989) (temporary restraining order); *see also* Fed.R.Civ.P. 65. When the probability of success on the merits is questionable but "the balance of other factors tips decidedly toward movant[,] a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation." *Dataphase Systems*, 640 F.2d at 113.

The case at bar is not unique in the Eighth Circuit. North Dakota has also recently enacted new abortion laws, the North Dakota Abortion Control Act. The North Dakota Abortion Control Act contains provisions similar to some sections of the South Dakota Act challenged in the instant case, and the North Dakota law was also challenged as unconstitutional. Currently, the enforcement of the North Dakota Abortion Control Act is stayed until the Eighth Circuit issues its opinion on the merits of the case. *Fargo Women's Health Org. v. Schaefer*, No. 93-1579 (8th Cir. April 14, 1993).

Plaintiffs have submitted several declarations attesting to the damage that the Act will cause to plaintiffs and their patients. Plaintiffs claim that the Act will place substantial obstacles in the paths of their patients seeking abortions. The alleged obstacles include inordinately increased expenses, loss of confidentiality, difficulty in arranging child care and time away from work, and unwarranted delays. Should the court refuse to issue

injunctive relief and allow the Act take effect on July 1, 1993, plaintiffs assert that they and their patients will suffer immediate and irreparable injury.

Should the court grant injunctive relief, the status quo will be maintained until a full and fair hearing on the merits of this case. The continuation of the status quo for such a short duration should not harm defendants. The court thus finds that the threat of harm to plaintiffs if injunctive relief were denied outweighs any harm caused to defendants by a grant of injunctive relief. Further, the public interest dictates that the court should not allow the enforcement of this Act until a decision is reached on the merits of this case.

The probability of plaintiffs' success on the merits is difficult to gauge at this point, especially given the case pending before the Eighth Circuit concerning the North Dakota Abortion Control Act. However, the court need not calculate plaintiffs' probability of success on the merits with mathematical precision at this early stage. *Dataphase Systems*, 640 F.2d at 113. Because the balance of the other factors tips decidedly toward plaintiffs, and plaintiffs have "raised questions so serious and difficult as to call for more deliberate investigation," the court will grant plaintiffs' request for injunctive relief by granting a temporary restraining order. Therefore, it is

ORDERED that defendants are temporarily restrained from enforcing South Dakota's newly enacted abortion Act, namely HB 1131, amending S.D.C.L. §§ 34-23A-1, *et seq*. This temporary restraining order will take effect on July 1, 1993, the date that the Act was scheduled to take effect. This temporary restraining order

will continue for ten (10) days thereafter or until the date that a hearing is held and a decision filed regarding the motion for preliminary injunction, whichever date is earlier.

Dated June 16, 1993.

BY THE COURT:

/s/ Donald J. Porter
Senior U.S. District Judge

Attest:
William F. Clayton, Clerk
By: /s/ Vicky J. Reinhard
Deputy
(Seal of Court)

Filed June 25, 1993
William F. Clayton
Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

PLANNED PARENTHOOD, SIOUX FALLS CLINIC; BUCK J. WILLIAMS, M.D., and WOMEN'S MEDICAL SERVICES, P.C.,	)	CIV. 93-3033
Plaintiffs,	)	
vs.	)	SCHEDULING ORDER AND ORDER CONTINUING TEMPORARY INJUNCTION
WALTER D. MILLER, Governor, and MARK W. BARNETT, Attorney General, in their official capacities,	)	
Defendants.	)	

A telephonic status hearing was held on this date and, pursuant to Fed. R. Civ. P. 16(b), the Court requested the suggestions of the parties concerning deadlines for the prompt disposition of this case. Based on the responses received, it is hereby

ORDERED that all discovery in this matter shall be completed on or before August 1, 1993. This means that all discovery requests shall be served so that they may be complied with, within the time permitted by the rules of discovery, by August 1, 1993.

IT IS FURTHER ORDERED that motions to compel discovery shall be filed no later than ten working days after the subject matter of the motion arises. Motions to compel discovery shall not be filed until the parties have complied with D.S.D. LR 37.1

IT IS FURTHER ORDERED that all other motions, except motions in limine concerning questions of evidence, shall be filed on or before August 15, 1993. All motions shall comply with the local rules regarding motions.

IT IS FURTHER ORDERED that, based upon the stipulation of counsel, the temporary injunction restraining enforcement of HB 1131, as more fully described in the order of June 16, 1993, issued by Senior United States District Judge Donald J. Porter, is continued until further order of the Court. It is contemplated that summary judgment motions under Fed. R. Civ. P. 56 and D.S.D. LR 56.1 will be filed by one or both parties by August 15, 1993. This order does not prejudice the right of any party to withdraw its agreement to the temporary injunction at some future time and request a hearing pursuant to Fed. R. Civ. P. 65.

Dated June 25, 1993.

BY THE COURT:

/s/ Richard H. Battey
United States District Judge

Attest:
William F. Clayton, Clerk
By: /s/ Alice R. Raesly
Deputy Clerk
(Seal)

Filed October 28, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

PLANNED PARENTHOOD, SIOUX FALLS CLINIC; BUCK J. WILLIAMS, M.D., and WOMEN'S MEDICAL SERVICES, P.C.,	)	CIV. 93-3033
Plaintiffs,	)	ORDER DENYING MOTION TO CERTIFY
vs.	)	
WALTER D. MILLER, Governor, and MARK W. BARNETT, Attorney General, in their official capacities,	)	
Defendants.	)	

Defendants have filed a motion to certify certain questions regarding a South Dakota statute to the South Dakota Supreme Court pursuant to South Dakota Codified Law ch. 15-24A. The Court has considered the filings and has concluded that oral argument on the motion is unnecessary. It is hereby

ORDERED that defendants' motion to certify (Docket No. 53) is denied. Pursuant to the Court's order of August 9, 1993, a new scheduling order shall issue forthwith.

Dated this 28th day of October, 1993.

BY THE COURT:

/s/ Richard H. Battey
United States District Judge

ATTEST:
WILLIAM F. CLAYTON, CLERK
By: /s/ Alice R. Raesly
Deputy Clerk
(SEAL)

Filed December 9, 1993
William F. Clayton, Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

PLANNED PARENTHOOD, SIOUX FALLS CLINIC; BUCK J. WILLIAMS, M.D., and WOMEN'S MEDICAL SERVICES, P.C.,	)	CIV. 93-3033
Plaintiffs,	)	
vs.	)	ORDER
WALTER D. MILLER, Governor, and MARK W. BARNETT, Attorney General, in their official capacities,	)	
Defendants.	)	

Defendants have filed a motion to amend the Court's order of October 28, 1993, denying defendants' motion to certify certain questions to the South Dakota Supreme Court. Defendants seek an amendment to the Court's October 28 order to include language pursuant to 28 U.S.C. § 1292(b) that whether or not to certify questions to the South Dakota Supreme Court "involves a controlling question of law as to which there is substantial ground for difference of opinion and that intermediate appeal from the order may materially advance the ultimate termination of the litigation."

The Court has considered the filings made in connection with the defendants' motion. The choice between

whether this Court or the South Dakota Supreme Court answers certain questions relevant in this case is not a controlling question of law. Both courts would resolve the questions with reference to the same law, so the issue of which court answers the questions is not controlling. Furthermore, certifying this issue for immediate interlocutory appeal will not materially advance the ultimate termination of this litigation, but rather would result in delay. Finally, the Court notes that a party's interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is not a matter of right, but rather rests in the discretion of the district and appellate courts. Accordingly, it is hereby

ORDERED that defendants' motion to amend order denying motion to certify (Docket No. 60) is denied.

Dated this 9th day of December, 1993.

BY THE COURT:

/s/ Richard H. Battey
United States District Judge

ATTEST:
WILLIAM F. CLAYTON, CLERK
By: /s/ Alice R. Raesly
Deputy Clerk
(SEAL)

Filed August 22, 1994
William F. Clayton, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

PLANNED PARENTHOOD, SIOUX FALLS CLINIC; BUCK J. WILLIAMS, M.D.; and WOMEN'S MEDICAL SERVICES, P.C.,	)	CIV. 93-3033
Plaintiffs,	)	MEMORANDUM OPINION
vs.	)	
WALTER D. MILLER, Governor, and MARK W. BARNETT, Attorney General, in their official capacities,	)	
Defendants.	)	

NATURE AND PROCEDURAL HISTORY

This action was filed by Planned Parenthood, Sioux Falls Clinic; Buck J. Williams, M.D.; and Women's Medical Services, P.C., on June 15, 1993. Defendant is the state of South Dakota, represented by Walter D. Miller and Mark W. Barnett, its governor and attorney general respectively. The complaint challenges the constitutionality of certain parts of Chapter 249 of the South Dakota Session Laws (HB 1131) entitled, "An Act to Regulate the Performance of Abortion," which amends South Dakota Codified Law (SDCL) Chapter 34-23A.

The Court has jurisdiction under 28 U.S.C. § 1331, as the action arises under the constitution and laws of the United States.

HB 1131 was signed by the governor on March 15, 1993, and by operation of law would have become effective July 1, 1993. Prior to its effective date and following a temporary restraining order issued by this Court and stipulation of counsel, the effective date of the act has been stayed pending final determination of the constitutional questions.

Cross motions for summary judgment have been filed on all issues. The motions before the Court consist of defendants' motion to partially vacate stay and for partial summary judgment on the "informed consent" provisions of the statute (Docket #71); plaintiffs' motion for summary judgment concerning the challenge to the statute (Docket #85); and defendants' cross motion for summary judgment on remaining issues and motion to vacate stay (Docket #99).

ISSUES

Plaintiffs challenge section 2[1] of HB 1131 which amended SDCL 34-23A-7 relating to the performance of

---

[1] Section 2 of HB 1131, amending SDCL 34-23A-7, is as follows:

> 34-23A-7. No abortion may be performed upon an unemancipated minor or upon a female for whom a guardian has been appointed because of a finding of incompetency, until at least forty-eight hours after written notice of the pending operation has been delivered in the manner specified in this section. The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent. In lieu of

an abortion upon an unemancipated minor,[2] providing for a one-parent notification provision without a judicial

---

> such delivery, notice may be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee, which means a postal employee can only deliver the mail to the authorized addressee. If notice is made by certified mail, the time of delivery shall be deemed to occur at twelve o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.
> No notice is required under this section if:
> (1) The attending physician certifies in the pregnant minor's medical record that, on the basis of the physician's good faith clinical judgment, a medical emergency exists that so complicates the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function and there is insufficient time to provide the required notice; or
> (2) The person who is entitled to notice certifies in writing that he has been notified; or
> (3) The pregnant minor declares, or provides information that indicates, that she is an abused or neglected child as defined in § 26-8A-2 and the attending physician has reported the alleged or suspected abuse or neglect as required in accordance with §§ 26-8A-3, 26-8A-6 and 26-8A-8. In such circumstances, the department of social services, the state's attorney and law enforcement officers to whom the report is made or referred for investigation or litigation shall maintain the confidentiality of the fact that she has sought or obtained an abortion and shall take all necessary steps to ensure that this information is not revealed to her parents.

[2] SDCL 25-5-24 defines an emancipated minor as any person under the age of eighteen years who:

bypass. Challenge is also made to that part of SDCL 34-23A-10.1[3] which provides for a 24-hour wait and

---

(1) Has entered into valid marriage, whether or not such marriage was terminated by dissolution; or

. . .

(3) Has received a declaration of emancipation pursuant to § 25-5-26.

SDCL 25-5-25. Age of majority for certain purposes – Parent or guardian liability. An emancipated minor shall be considered as being over the age of majority for the following purposes:

(1) For the purpose of consenting to medical, chiropractic, optometric, dental or psychiatric care, without parental consent, knowledge or liability; . . .

[3] Section 4 of HB 1131 amending SDCL 34-23A-10.1 reads as follows:

34-23A-10.1. No abortion may be performed except with the voluntary and informed consent of the female upon whom the abortion is to be performed. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if:

(1) The female is told the following by the physician who is to perform the abortion or by the referring physician, at least twenty-four hours before the abortion:

(a) The name of the physician who will perform the abortion;

(b) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility;

(c) The probable gestational age of the unborn child at the time the abortion is to be performed; and

(d) The medical risks associated with carrying her child to term;

notice under the informed consent statute. SDCL 34-23A-10.1(1) and (2). The next challenge is to

---

(2) The female is informed, by telephone or in person, by the physician who is to perform the abortion, by the referring physician, or by an agent of either, at least twenty-four hours before the abortion:

(a) That medical assistance benefits may be available for prenatal care, childbirth and neonatal care;

(b) That the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion; and

(c) That she has the right to review the printed materials described in section 5 of this Act [SDCL 34-23A-10.3]. The physician or his agent shall orally inform the female that the materials have been provided by the State of South Dakota. If the female chooses to view the materials, they shall either be given to her at least twenty-four hours before the abortion or mailed to her at least seventy-two hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee;

(3) The female certifies in writing, prior to the abortion, that the information described in subdivisions (1) and (2) of this section has been furnished her, and that she has been informed of her opportunity to review the information described in section 5 of this Act; and

(4) Prior to the performance of the abortion, the physician who is to perform the abortion or his agent receives a copy of the written certification prescribed by subdivision (3).

section 7[4] which amended SDCL 34-23A-10.2 to provide a criminal penalty for a violation of SDCL 34-23A-7 (one-parent notification), SDCL 34-23A-10.1 (informed consent), section 6[5] (medical emergency). Finally, challenge is

---

The physician may provide the information prescribed in subdivision (1) by telephone without conducting a physical examination or tests of the patient, in which case the information required to be supplied may be based on facts supplied the physician by the female and whatever other relevant information is reasonably available to the physician.

[4] Section 7 of HB 1131, amending SDCL 34-23A-10.2, is as follows:

34-23A-10.2. A physician who violates § 34-23A-7, 34-23A-10.1 or section 6 of this Act is guilty of a Class 2 misdemeanor. The court in which a conviction of a violation of § 34-23A-7, § 34-23A-10.1 or section 6 of this Act occurs shall report such conviction to the board of medical and osteopathic examiners.

No penalty may be assessed against the female upon whom the abortion is performed or attempted to be performed. No criminal penalty or civil liability for failure to comply with § 34-23A-10.1(2)(c) or that portion of § 34-23A-10.1(3) requiring a written certification that the woman has been informed of her opportunity to review the information referred to in § 34-23A-10.1(2)(c) may be assessed unless the department of health has made the printed materials available at the time the physician or his agent is required to inform the female of her right to review them.

[5] Section 6 of HB 1131 added a new section 34-23A-2.1 as follows:

If a medical emergency compels the performance of an abortion, the physician shall inform the female, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or that a delay will create

made to section 8[6] which amended SDCL 34-23A-22 providing for civil punitive and treble actual damages when an abortion is performed in violation of the provisions of sections 34-23A-2.1, 34-23A-7, and 34-23A-10.1.

---

serious risk of substantial and irreversible impairment of a major bodily function.

[6] Section 8 of HB 1131 added a new section 34-23A-22 as follows:

If any abortion occurs which is not in compliance with §§ 34-23-7 [sic], 34-23A-10.1 or section 6 of this Act, the person upon whom such an abortion has been performed, and the parent of a minor child upon whom such an abortion was performed, or any of them, may maintain an action against the person who performed the abortion for ten thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained. Any person upon whom such an abortion has been attempted may maintain an action against the person who attempted to perform the abortion for five thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained.

If judgment is rendered in favor of the plaintiff in any such action, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against the defendant. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney's fee in favor of the defendant against the plaintiff.

SUMMARY JUDGMENT STANDARD

This case comes before the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure providing for summary judgment.

Under the summary judgment standard to be applied by the Court, the Court is guided by the trilogy of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The Court is also mindful of *Commercial Union Insurance Co. v. Schmidt*, 967 F.2d 270, 271-72 (8th Cir. 1992), where the court outlined the summary judgment procedure.[7]

---

[7] Once the motion for summary judgment is made and supported, it places an affirmative burden on the non-moving party to go beyond the pleadings and "by affidavit or otherwise" designate "specific facts showing that there is a genuine issue for trial." In designating specific facts, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment" because Rule 56(c) requires "that there be no *genuine* issue of *material* fact." In order to determine which facts are material, courts should look to the substantive law in a dispute and identify the facts which are critical to the outcome. A dispute about a material fact is genuine if the evidence is such that a reasonable trier of fact could return a decision in favor of the party opposing summary judgment. In performing the genuineness inquiry, trial courts should believe the evidence of the party opposing summary judgment and all justifiable inferences should be drawn in that party's favor. A court is not to "weigh the evidence and determine the truth of the matter but [instead should] determine whether there is a genuine issue for trial." (Citations omitted.)

The Court understands that a decision granting summary judgment is subject to review de novo. *Gumersell v. Director Fed. Emergency Management Agency*, 950 F.2d 550, 553 (8th Cir. 1991).

FINDINGS OF FACT

The Court finds the following undisputed facts:

1. Buck Williams, M.D., Sioux Falls, South Dakota, is the only physician providing abortion services within the exterior boundaries of South Dakota.

2. Dr. Williams is the only physician providing abortion services in a 235-mile radius of Sioux Falls, which includes the four contiguous states of Minnesota, North Dakota, Nebraska, and Iowa.

3. Dr. Williams currently provides abortions as a one-day service. Abortions are commonly scheduled by telephone on one day and the abortion is provided on another day.

4. During 1991, the latest year for which statistics are available, 486 South Dakota residents received abortions in neighboring states, and 774 South Dakota residents received abortions from Dr. Williams.

5. Approximately 17 percent of the total South Dakota women receiving abortions travel 300 miles or more each way.

6. Patients travel from the extreme western border of the state of South Dakota from cities and towns located in the Black Hills area, a distance of over 300 miles.

7. The Court takes judicial notice of the fact that travel from Rapid City to Sioux Falls via Interstate 90 is 340 miles.

8. Approximately 25 percent of Dr. Williams' patients are women below the federal poverty level.

9. South Dakota has a higher rate of poverty than the national average, including a higher rate of poverty among female head of household with children under five and a higher rate of poverty among its Native American population.

10. Many of Dr. Williams' patients are single women who already have children.

11. Two full days of absence entails loss of hourly wages, child care expenses, and travel expenses and lodging.

12. Confidentiality is a paramount concern for many abortion patients.

13. A telephone interview would approximate three to fifteen minutes, depending upon the questions of the patient.

DISCUSSION

1. Background

It has been the law since 1973 that there is a right of privacy, a liberty interest protecting a female's right to decide whether to terminate her pregnancy, arising under the Due Process Clause of the Fourteenth Amendment to the Constitution. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

This is not to say that this right is absolute and unqualified. *Roe* recognized that the state has certain rights to be asserted in the abortion decision. *Id.* at 727. These rights, however, may be justified only by a "compelling state interest." Legislative enactments must be narrowly drawn to express only the legitimate interests at stake. *Id.* at 728 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965)), and other cases.

After twenty-one years, the basic holdings of *Roe* were reaffirmed by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) in the joint opinion of Justices O'Connor, Kennedy, and Souter, joined in part by Justices Stevens and Blackmun. Chief Justice Rehnquist and Justices White, Scalia, and Thomas dissented. To be sure, not all of *Roe*'s holdings have been sustained. *Casey* overruled the strict scrutiny test of *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (*Akron I*). *Casey*, 112 S.Ct. at 2817. It also held *Roe*'s trimester framework too rigid and unnecessary. It further clarified the state's involvement in the abortion decision during the first trimester as interpreted in *Roe* by holding the state is not prohibited from regulations which would ensure a thoughtful and informed choice to terminate pregnancy, even during the first trimester. *Id.* at 2818. The joint opinion held that "[o]nly where state regulation imposes an *undue burden* on a woman's ability to make this abortion decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.* at 2819 (emphasis supplied).

2. One-Parent Notification Provision Without Bypass.

A minor is entitled to a supervised bypass or waiver proceeding to obviate the necessity for parental notice. A court is the usual bypass agency, but it need not be the exclusive one. The purpose of such a proceeding is for the minor to show that she is of sufficient maturity[8] to appreciate the importance of her decision (mature minor) or if she is not of sufficient maturity to make the decision independently, nonetheless the abortion decision without parental notice is in her best interest (best interest minor). Such proceeding must provide for an expeditious resolution of the abortion decision. The minor's confidentiality must also be protected. Whatever procedure is used, it must ensure that parental notice does not amount in fact to a parental veto. *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (*Bellotti II*).

It is with this background in mind that the Court considers the constitutionality of HB 1131 containing a one-parent notification provision but which does not provide for a supervised bypass procedure. The Court is aided by precedent. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed. 2d 788 (1976) (spousal consent provision and a blanket parental consent requirement held unconstitutional); *H.L. v. Matheson*, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981) (Utah

---

[8] South Dakota implicitly recognizes the maturity of a 16 year old female to make the decision to give her consent to sexual intercourse. *See* SDCL 22-22-1(5). The age of consent was decreased from 18 years to 16 years in 1972 by chapter 154, section 21, 1972 session laws. *See State v. Heisinger*, 252 N.W.2d 899, 902 (S.D. 1977).

statute as applied to an unemancipated minor living with and dependent upon her parents and making no claim or showing as to her maturity or as to her relations with her parents held constitutional); *Akron I*, 103 S.Ct. at 2499, (Ohio statute requiring parental consent on all second trimester minors is unconstitutional without adequate court bypass); *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990) (both parents' notification requirement of minor's abortion decision without judicial bypass is unconstitutional); *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 655 F.2d 848, 859 (8th Cir. 1981) (provision of statute requiring notice to parents of all minors is unconstitutional because it requires notice to parents of minors who are mature or for whom it is not in their best interest to give notice).

The parties cite no authority and the Court has been unable to find authority which establishes that a one-parent notice provision without judicial bypass such as found in SDCL 34-23A-7 is constitutional. In *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (en banc), *aff'd*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), the Court considered a Minnesota statute which required a minor to notify her parents of her desire to obtain an abortion or to seek judicial bypass. The Minnesota district court held the statute *as applied* as unconstitutional. The Supreme Court concluded that the Minnesota statutory plan which included a judicial bypass was constitutional and complied with the principles announced in *Bellotti II*, *Ashcroft*, and *Matheson*. *Hodgson*, 110 S.Ct. at 2947.

SDCL 34-23A-7 requires notice only to one parent.[9] It is less restrictive upon the abortion decision than the statute considered in *Hodgson*. Whether there is a one-parent or a two-parent notice provision under the Minnesota statute in *Hodgson* is immaterial in the face of a lack of adequate bypass procedure. Accordingly, this Court focuses on the lack of bypass.

State and parental interests must yield to the constitutional right of a mature minor, or of an immature minor whose best interests are contrary to parental involvement, to obtain an abortion without consulting or notifying the parent or parents. *Hodgson*, 853 F.2d at 1455 (citing *Akron I*, 103 S.Ct. at 2491 n.10). Thus, if parental involvement is encouraged by the state it must provide an alternate procedure to which a minor mature enough to make her own decision may turn or to show, if not considered "mature," that the abortion is in her "best interests." *Hodgson*, 853 F.2d at 1456.

Tested by these authorities, this Court holds SDCL 34-23A-7 (chapter 249 1993 session laws, section 2) unconstitutional in not providing such a bypass. The statutory omission constitutes an undue burden on the minor's privacy right to make the abortion decision.

The state attempts to convince the Court that SDCL 26-8A-2[10] defining an "abused and neglected child,"

---

[9] SDCL 34-23A-1(3). "Parent," one parent of the pregnant minor or the guardian or conservator of the pregnant female.

[10] 26-8A-2. Abused or neglected child defined. In this chapter and chapter 26-7A, the term "abused or neglected child" means a child:

when construed together with SDCL 34-23A-7(3), constitutes an effective "doctor bypass" for the "best interest" minor. The state contends this doctor bypass saves the statute from constitutional challenge. The state's position is that when information is given which indicates that the minor is abused or neglected, the physician is given statutory authority under SDCL 34-23A-7(3) to perform the abortion without parental notification. The Court is

---

(1) Whose parent, guardian, or custodian has abandoned the child or has subjected the child to mistreatment or abuse;
(2) Who lacks proper parental care through the actions or omissions of the child's parent, guardian or custodian;
(3) Whose environment is injurious to the child's welfare;
(4) Whose parent, guardian or custodian fails or refuses to provide proper or necessary subsistence, supervision, education, medical care or any other care necessary for the child's health, guidance or well-being;
(5) Who is homeless, without proper care or not domiciled with the child's parent, guardian or custodian through no fault of the child's parent, guardian or custodian;
(6) Who is threatened with substantial harm;
(7) Who has sustained emotional harm or mental injury as indicated by an injury to the child's intellectual or psychological capacity evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance and behavior, with due regard to the child's culture; or
(8) Who is subject to sexual abuse, sexual molestation or sexual exploitation by the child's parent, guardian, custodian or any other person responsible for the child's care.

not persuaded. The state's argument proceeds on a false premise, namely, that all pregnant minors, including "mature minors" or "best interest minors" fall within the statutory classification of "abused and neglected children." Thus the state would have the Court apply the statute too narrowly. An effective, alternative bypass procedure would place the decision in the hands of a neutral and detached agency such as a court which would be able to take into consideration the competing interests involved in the abortion decision. This is not to say that a court or other bypass agency has a veto on the abortion decision any more than does the parent. The bypass authority is limited to a factual finding of whether the minor is of sufficient maturity to make the abortion decision or whether the decision is in her best interest. If either a finding of "maturity" or "best interest" is made, the notice is simply not given to the parent. The abortion proceeds without such notice.

The physician performing the abortion can hardly be said to be the neutral and detached agency performing the bypass function. Furthermore, a minor's pregnancy does not automatically reduce the minor to the status of being "abused and neglected." The state's "doctor bypass" theory is unsupported by authority and is overreaching by the state in an attempt to explain the lack of a bypass alternative. To require a minor to be declared an "abused or neglected child" under SDCL 26-8A-2 by reason of the status of being pregnant simply burdens her constitutionally protected right of privacy. The Court finds the statute unconstitutional.

3. 48-Hour Wait

SDCL 34-23A-7 provides that "no abortion may be performed upon an unemancipated minor or upon a female for whom a guardian has been appointed because of a finding of incompetency, until at least forty-eight hours after written notice of the pending operation has been delivered in the manner specified in this section." The statute then authorizes notice to be delivered personally to the parent by either the physician or an agent of the physician. In lieu of personal delivery notice may be made by certified mail. It also provides for an exception in the case of (1) medical emergency; (2) waiver of notice; or (3) a declaration that the minor is an abused or neglected child as defined in SDCL 26-8A-2 which has been reported to appropriate authorities.

In *Hodgson*, 110 S.Ct. at 2929, the Court discussed the rationale for such waiting period. The Court held that "[t]o the extent that . . . the state statute requires that a minor wait 48 hours after notifying a single parent of her intention to obtain an abortion, it reasonably furthers the legitimate state interest in ensuring that the minor's decision is knowing and intelligent." The decision in *Hodgson* forecloses the issue of the 48-hour wait as it pertains to an unemancipated minor. The Court therefore finds the 48-hour waiting period constitutional. It strikes the balance between the competing interests involved.

4. Civil Penalty Provision

HB 1131 added a new section providing for a civil cause of action against a person who performs an abortion without complying with the requirements of the statute. The section provides in part that the parent of a minor child or the minor child "may maintain an action against the person who performed the abortion for ten thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained. Any person upon whom such an abortion has been attempted may maintain an action against the person who attempted to perform the abortion for five thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained." The statute further provides for a judgment of reasonable attorney's fees in favor of the plaintiff, or in the case of a suit that was found to be frivolous and brought in bad faith, attorney's fees are awardable in favor of defendant as against the plaintiff. SDCL 34-23A-22.

The statute appears to be substantially the same and perhaps taken from the North Dakota Century Code, chapter 14-02.1-03.2.[11] The issue of the constitutionality of

---

[11] 14-02-1.03.2 Civil damages for performance of abortions without informed consent.

Any person upon whom an abortion has been performed without informed consent as required by sections 14-02.1-02, 14-02.1-02.1, subsection 1 of section 14-02.1-03, 14-02.1-03.2, and 14-02.1-03.3 may maintain an action against the person who performed the abortion for ten thousand dollars in punitive damages and treble whatever actual damages the plaintiff

the North Dakota statute was not raised by the parties in *Fargo Women's Health Organization v. Sinner*, 819 F.Supp. 862 (D.N.D. 1993).[12]

The state's position is that the punitive damage award constitutes an upper limit or a "cap" on damages

---

may have sustained. Any person upon whom an abortion has been attempted without complying with sections 14-02.1-02, 14-02.1-02.1, subsection 1 of section 14-02.1-03, 14-02.1-03.2 and 14-02.1-03.3 may maintain an action against the person who attempted to perform the abortion for five thousand dollars in punitive damages and treble whatever actual damages the plaintiff may have sustained.

[12] In addition to the North Dakota statute, provisions in other states provide civil penalties to a greater or lesser degree. Tennessee Code Annotated, section 37-10-307, provides in part, "The law of this state shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this part [parental consent for abortion by minors]." West's Wisconsin Statutes Annotated, section 895.037 provides a penalty provision which reads in part, "Any person who . . . intentionally performs or induces an abortion on or for a minor whom the person knows or has reason to know is not an emancipated minor may be required to forfeit not more than $10,000."
Pennsylvania Consolidated Statutes Annotated, section 3217, provides in part, "Any physician who knowingly violates any of the provisions of section 3204 (relating to medical consultation and judgment) or 3205 (relating to informed consent) shall, in addition to any other penalty prescribed in this chapter, be civilly liable to his patient for any damages caused thereby and, in addition, shall be liable to his patient for punitive damages in the amount of $5,000, . . . "
Finally, the Code of Laws of South Carolina, section 44-41-35, provides in part, "The law of this State does not preclude the award of exemplary damages in an appropriate civil action relevant to violations concerning a minor."

and a court could, pursuant to the statute,[13] award less than $10,000 or less than $5,000 in case of an attempt. The clear and unambiguous wording of the statute provides for a strict liability of the $10,000 and $5,000 damages amount. If the legislature had intended these amounts to be only a cap, it knew how to use proper language to accomplish its intent. When in 1986 the legislature set a limitation on damages in medical malpractice actions of $1 million in total damages, it said, "damages which may be awarded *may not exceed* the sum of one million dollars." SDCL 21-3-11 (emphasis supplied). No such form of the language appears in newly-enacted SDCL 34-23A-22. The state attempts to buttress its position by the argument that the courts of South Dakota would interpret this section with reference to other South Dakota punitive damage statutes. Such argument misses the point. SDCL 34-23A-22 is clear and unambiguous. Because it is clear and unambiguous, the Court cannot resort to rules of statutory construction to determine its true meaning. The Supreme Court of South Dakota stated:

> The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used.
>
> Words and phrases in a statute must be given their plain meaning and effect. When the language of a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed.

US West Communications v. Public Utilities Commission, 505 N.W.2d 115, 123 (S.D. 1993) (citing *Appeal of AT&T Info. Sys.*, 405 N.W.2d 24 (S.D. 1987)). Accordingly, the Court can only conclude the statute to be a strict liability statute which chills the abortion decision. The statute, providing as it does for strict liability, constitutes a constitutionally impermissible obstacle to the woman's abortion decision. South Dakota has one physician providing abortion services. If this statutory provision is allowed to stand, there may not be any provider willing to subject himself or herself to the vagaries of the statute. What then would be the choice remaining for those women who desire to exercise their constitutional rights consistent with *Roe* and *Casey*? The Court finds that SDCL 34-23A-22 is unconstitutional.

5. Informed Consent

The state's informed consent provision is SDCL 34-23A-10.1(1)-(4). The statute merely codifies, in the abortion context, what in the absence of such context would be the duty of a physician performing any medical procedure. Physicians practicing in South Dakota have a common law duty to ensure that their patients' consent to

[13] The statute providing for both treble damages and punitive damages of $10,000 may itself be contrary to the law of South Dakota. As late as 1993 the South Dakota Supreme Court held that where a statute provided for double damages, further punitive damages are not recoverable. *Nelson v. WEB Water Dev. Ass'n, Inc.*, 507 N.W.2d 691 (S.D. 1993). That issue, however, is not before this Court.

medical treatment is informed. According to the South Dakota Supreme Court,

> A doctor has the duty to make a reasonable disclosure to his patient of the significant risks in view of the gravity of the patient's condition, the probabilities of success, and any alternative treatment or procedures, if such are reasonably appropriate, so that the patient has the information reasonably necessary to form the basis of an intelligent and informed consent to the proposed treatment or procedure.

Cunningham v. Yankton Clinic, P.A., 262 N.W.2d 508, 511 (S.D. 1978). The failure by a physician to obtain informed consent in the case of any medical treatment could expose the physician to a malpractice tort claim and its consequent damages of up to $1 million. Thus, since a physician is already required to disclose this type of information under the common law, the disclosure required by SDCL 34-23A-10.1(1)-(4) does not substantially interfere with the woman's right of choice.[14] This is the type of information which would have to be included in a reasonable disclosure absent such a statute. The statute merely defines what otherwise would be required in a properly informed consent decision. It therefore may reasonably offer the physician more and not less protection from malpractice claims. Arguably, a greater number

---

[14] While the Court has some concern over the impact of SDCL 34-23A-10(2)(c) which refers to the review of printed material described in SDCL 34-23A-10.3 upon the abortion decision, the fact that the female has a right to either choose or refuse such material saves the provision from constitutional infirmity.

of physicians, not fewer, will be willing to provide abortion services.

A state's interest in potential life may be advanced by the enactment of legislation designed to ensure that a woman's decision to terminate a pregnancy will be informed. *Casey*, 112 S.Ct. at 2821. The legislation, however, may not constitute an undue burden on the woman's choice. *Id.* at 2820. Several cases have considered the constitutionality of the informed consent legislation which has been enacted by various states. *Id.* at 2826 (holding the Pennsylvania informed consent statute constitutional because it was not unduly burdensome); *Barnes v. Moore*, 970 F.2d 12, 15 (5th Cir. 1992) (holding the Mississippi informed consent statute constitutional due to its similarity to the Pennsylvania statute); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 530 (8th Cir. 1994) (holding the North Dakota informed consent statute constitutional due to its similarity to the Pennsylvania statute and because it was not unduly burdensome).

SDCL 34-23A-10.1(1)-(4) contains provisions substantially similar to the statutes which have been declared constitutional in *Casey*, *Barnes*, and *Schafer*. In addition, the alleged impact of the statute is also substantially similar to the impact found by the district court in *Casey*.

In analyzing a Utah informed consent statute, the Utah district court said,

> Where a state passes abortion legislation which is less than or equal to the restrictions imposed by the Pennsylvania law, and where the plaintiffs are unable to allege any impact from the legislation which is more burdensome than was

found by the district court in *Casey*, there is no viable cause of action.

Utah Women's Clinic, Inc. v. Leavitt, 844 F.Supp. 1482, 1491 (D. Utah 1994).

The South Dakota statute dictates certain information be provided to the woman before she can effectively give informed consent. This information includes the name of the doctor who will perform the abortion, the risks associated with the abortion procedure and with continuing the pregnancy, and the probable gestational age of the fetus. This information must be given by either the physician who will perform the abortion or the referring physician. In *Casey*, the Supreme Court overruled the sections of *Akron I*, 103 S.Ct. at 2481 and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) which held that a state could not require a physician to provide a woman with certain information designated to dissuade her from having an abortion. *Casey*, 112 S.Ct. at 2823. The Supreme Court held that requiring a doctor to make certain information available to the woman is permissible as long as the information is truthful and not misleading. *Id.* at 2823. Requiring certain information be made available was not an undue burden. *Id.* at 2824.

6. Criminal Penalty

SDCL 22-6-2 divides misdemeanor crimes into two classes, distinguished by the penalty of the violation. A Class 1 misdemeanor carries with it a penalty of one year imprisonment in a county jail, a $1,000 fine, or both. A

Class 2 misdemeanor provides for thirty-day imprisonment in a county jail, a $100 fine, or both. A Class 2 misdemeanor with its permitted loss of liberty is not a minimum sanction. South Dakota also provides for petty offenses, e.g., speeding and the like. Petty offenses are civil proceedings and are governed by the procedure set forth in SDCL 23-1A. *See* SDCL 22-6-7. Petty offenses are not crimes. A misdemeanor, whether Class 1 or Class 2, is a crime.

A physician who violates SDCL 34-23A-2.1 (medical emergency), 34-23A-7 (abortion on unemancipated minor), or SDCL 34-23A-10.1 (abortion without informed consent) is guilty of a Class 2 misdemeanor. The court in which a conviction occurs is required to report such conviction to the Board of Medical and Osteopathic Examiners. SDCL 34-23A-10.2. This penalty clause carries with it severe implications to the physician involving a risk of loss of personal liberty and the license to practice medicine.

On its face SDCL 34-23A-10.2 does not contain a scienter requirement. To this the state agrees. The state argues that a South Dakota court in the application of the statute will infer, and therefore include, a scienter clause. Such assurance is of little comfort to a physician who desires to conform his conduct to the law.

In referring to the words "motor vehicle" used in the Motor Vehicle Theft Act (18 U.S.C § 408), Mr. Justice Holmes stated, "[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear. . . . " *McBoyle v.*

United States, 283 U.S. 25, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931). The early case of *McBoyle* was quoted with approval as late as 1994 in *Ratzlaf v. United States*, ___ U.S. ___, 114 S.Ct. 655, 663, 126 L.Ed.2d 615 (1994).

The question to this Court then is: By what standard would a physician's conduct be judged under SDCL 34-23A-10.2? While a South Dakota court may include a scienter requirement of "knowingly" or "willfully" or perhaps some other term describing the mental state required, why should a physician desiring to comply with the law in good faith have to guess at his or her peril as to how a court will define the scienter requirement? The posing of the question seems to suggest the answer. The statute as drawn acts as a chilling effect upon a physician's desire to continue performing abortions under the law as written. This may be especially chilling in a state such as South Dakota where, at the present time, there is only one physician willing to perform abortions. It seems to this Court that where a basic constitutional right of the female is involved, that the chilling effect becomes much more significant as it impacts the abortion decision and the ability to find competent physicians to perform the procedure. Accordingly, the Court finds that the statute is vague, uncertain, and lacks an accurate definition of the mental state required. It is simply another obstacle placed upon a woman's privacy right. The Court finds that SDCL 34-23A-10.2 is unconstitutional.

7. 24-Hour Waiting Period of SDCL 34-23A-10.1(2)

Plaintiffs' position is that the South Dakota informed consent provision is unduly burdensome in that it

requires the doctor who is to perform the abortion or the referring doctor to provide the patient with certain information 24 hours before the abortion, either by phone or in person. According to plaintiffs, this would impose an undue burden because Dr. Williams is the only doctor in South Dakota who performs abortions. It would take him seven hours a week to make the required phone calls, and this would cause him to lose revenue which would have to be passed on to his patients at an increased cost of $60 per abortion.

Both the Pennsylvania and the Mississippi statutes require the similar information be provided by a physician. In analyzing the Pennsylvania statute, the Supreme Court held that to require a doctor to give information is not an undue burden. It is a reasonable way to assure informed consent. *Casey*, 112 S.Ct. at 2824-25. The statute at issue in *Casey* was even more restrictive than the statute at issue in this case. In Pennsylvania, there is no provision allowing notification by phone. Thus, two trips to the doctor are required before an abortion may be performed. *Id.* at 2825. The Supreme Court held, nevertheless, that the increased costs which this would cause were not a substantial obstacle. *Id.* at 2825. In addition, the South Dakota statute does allow for the referring physician to inform the woman of this information. Thus, Dr. Williams personally would not necessarily have to contact all of his patients. The doctor notification requirement is not an undue burden. The 24-hour waiting period of SDCL 34-23A-10.1(2) is not unconstitutional.

8. Exception for Rape Victims

Finally, plaintiffs contend that the fact that the South Dakota statute has no exception for rape victims or for women upon whom the information would have an adverse effect makes the statute unconstitutional under *Casey*.

The Pennsylvania informed consent statute provides,

> No physician shall be guilty of violating this section for failure to furnish the information required by subsection (a) if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.

18 Pa. Cons. Stat. Ann. § 3205(c). Although the Mississippi, North Dakota, and South Dakota statutes do not contain this exact language, these statutes do have similar exceptions for the health of the woman. These statutes all contain a medical emergency exception which provides that the requirements of the informed consent statute do not apply in the case of a medical emergency. Miss. Code Ann. § 41-41-33; N.D. Cent. Code § 14-02.1-03; SDCL 34-23A-10.1. According to the Eighth Circuit Court of Appeals, this exception for the health of the woman is similar to the Pennsylvania exception. *Schafer*, 18 F.3d at 533.

The Pennsylvania statute also has a provision which allows information concerning a father's liability for child support to be omitted when the woman seeking the abortion had been raped. 18 Pa. Cons. Stat. Ann.

§ 3205(a)(2)(iii). The rape exception is not present in the Mississippi statute analyzed in *Barnes*, in the North Dakota statute analyzed in *Schafer*, or in the South Dakota statute. The Eighth Circuit Court of Appeals and the Fifth Circuit Court of Appeals declined to find this exception necessary to the constitutionality of the statutes considered. *Schafer*, 18 F.3d at 534; *Barnes*, 970 F.2d at 15. Therefore, this Court also must find that the rape exception is not essential to hold the South Dakota statute constitutional.

CONCLUSION

The Court concludes that defendants' motion to vacate stay and for partial summary judgment will be granted. The Court finds that SDCL 34-23A-10.1 is constitutional.

The Court concludes that plaintiffs' motion for summary judgment declaring the provisions of SDCL 34-23A-7 unconstitutional in not providing a bypass is granted.

The Court concludes that plaintiffs' motion for summary judgment declaring SDCL 34-23A-22 and the penalty portion of SDCL 34-23A-10.2 as unconstitutional is granted.

Judgment shall be entered accordingly.

Dated this 22d day of August, 1994.

BY THE COURT:

/s/ Richard H. Battey
Chief Judge

Attest:

William F. Clayton, Clerk
By: /s/ Alice R. Raesly
Deputy Clerk

(Seal)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

PLANNED PARENTHOOD, SIOUX FALLS CLINIC; BUCK J. WILLIAMS, M.D.; AND WOMEN'S MEDICAL SERVICES, P.C.,	)	CIV. 93-3033
Plaintiffs,	)	JUDGMENT
vs.	)	
WALTER D. MILLER, GOVERNOR, AND MARK W. BARNETT, ATTORNEY GENERAL, IN THEIR OFFICIAL CAPACITIES,	)	
Defendants.	)	

Based upon the memorandum opinion of this date, it is hereby

ORDERED AND ADJUDGED that the penalty provision of SDCL 34-23A-10.2 is unconstitutional.

IT IS FURTHER ORDERED AND ADJUDGED that SDCL 34-23A-7 is unconstitutional in not providing a bypass procedure.

IT IS FURTHER ORDERED AND ADJUDGED that SDCL 34-23A-22 is unconstitutional.

IT IS FURTHER ORDERED AND ADJUDGED that SDCL 34-23A-10.1 is constitutional.

IT IS FURTHER ORDERED AND ADJUDGED that defendants are hereby restrained from enforcing SDCL 34-23A-10.2, 34-23A-22, and 34-23A-7.

The restraining order heretofore issued restraining the state from enforcing SDCL 34-23A-10.1 is dismissed.

IT IS FURTHER ORDERED that each party shall assume their respective costs.

Dated this 22d day of August, 1994.

BY THE COURT:

/s/ Richard H. Battey
Chief Judge

Attest:

William F. Clayton, Clerk
By: /s/ Alice R. Raesly
Deputy Clerk

(Seal)

SDCL 34-23A-7. Forty-eight hour notice to parent or guardian for minor or incompetent female – Delivery of notice – Exceptions.

No abortion may be performed upon an unemancipated minor or upon a female for whom a guardian has been appointed because of a finding of incompetency, until at least forty-eight hours after written notice of the pending operation has been delivered in the manner specified in this section. The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent. In lieu of such delivery, notice may be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee, which means a postal employee can only deliver the mail to the authorized addressee. If notice is made by certified mail, the time of delivery shall be deemed to occur at twelve o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

No notice is required under this section if:

(1) The attending physician certifies in the pregnant minor's medical record that, on the basis of the physician's good faith clinical judgment, a medical emergency exists that so complicates the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function and there is insufficient time to provide the required notice; or

(2) The person who is entitled to notice certifies in writing that he has been notified; or

(3) The pregnant minor declares, or provides information that indicates, that she is an abused or neglected child as defined in § 26-8A-2 and the attending physician has reported the alleged or suspected abuse or neglect as required in accordance with §§ 26-8A-3, 26-8A-6 and 26-8A-8. In such circumstances, the department of social services, the state's attorney and law enforcement officers to whom the report is made or referred for investigation or litigation shall maintain the confidentiality of the fact that she has sought or obtained an abortion and shall take all necessary steps to ensure that this information is not revealed to her parents.

SDCL 26-8A-2. Abused or neglected child defined.

In this chapter and chapter 26-7A, the term "abused or neglected child" means a child:

(1) Whose parent, guardian, or custodian has abandoned the child or has subjected the child to mistreatment or abuse;

(2) Who lacks proper parental care through the actions or omissions of the child's parent, guardian or custodian;

(3) Whose environment is injurious to the child's welfare;

(4) Whose parent, guardian or custodian fails or refuses to provide proper or necessary subsistence, supervision, education, medical care or any other care necessary for the child's health, guidance or well-being;

(5) Who is homeless, without proper care or not domiciled with the child's parent, guardian or custodian through no fault of the child's parent, guardian or custodian;

(6) Who is threatened with substantial harm;

(7) Who has sustained emotional harm or mental injury as indicated by an injury to the child's intellectual or psychological capacity evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance and behavior, with due regard to the child's culture; or

(8) Who is subject to sexual abuse, sexual molestation or sexual exploitation by the child's parent, guardian, custodian or any other person responsible for the child's care.

No. 95-856

Supreme Court, U.S.
FILED
DEC 28 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM J. JANKLOW, GOVERNOR, AND MARK W. BARNETT, ATTORNEY GENERAL, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

—v.—

PLANNED PARENTHOOD, SIOUX FALLS CLINIC, BUCK J. WILLIAMS, M.D. AND WOMEN'S MEDICAL SERVICES, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

COLLEEN K. CONNELL
THE ROGER BALDWIN FOUNDATION OF ACLU, INC.
203 N. LaSalle, #1405
Chicago, Illinois 60603
(312) 201-9740

CATHERINE WEISS
LOUISE MELLING
STEVEN SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

DARA KLASSEL
Counsel of Record
ROGER EVANS
EVE W. PAUL
LEGAL ACTION FOR REPRODUCTIVE RIGHTS
PLANNED PARENTHOOD FEDERATION OF AMERICA
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

26 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE

Respondents concur in Petitioners' statement of the procedural history of the case, but disagree with their description of the ruling of the court of appeals.

The court of appeals first determined what standard of review applies to facial challenges to abortion laws. It followed this Court's holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992) that "[i]f the law will operate as a substantial obstacle to a woman's choice to undergo an abortion 'in a large fraction of the cases in which it is relevant,...[i]t is an undue burden, and therefore invalid.'" Appendix to Petition for Writ of Certiorari (App.) 12 (citing 112 S. Ct. at 2830). The court of appeals rejected Petitioners' assertion that restrictions on abortion are valid on their face if they have any conceivable constitutional application. App. 9-12 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The court of appeals then applied the undue burden analysis set out in *Casey*. It found that a requirement of parental notification -- whether to one or two parents -- places a substantial obstacle in the path of minors seeking abortions because it gives parents an opportunity to obstruct their daughter's choice. App. 16-18. Moreover, it held that the burden is not justified for mature minors or for minors whose best interests would be served by an abortion without parental involvement. It concluded that a statute that fails to provide a bypass procedure enabling such minors to avoid parental involvement is an undue burden and unconstitutional. App. 18.

The court of appeals then considered whether the statute provides an adequate "bypass" because it allows the physician to dispense with notifying a parent if the minor declares herself to be abused or neglected and the physician reports that abuse or neglect to state authorities. The court found the exception insufficient because it does not provide an opportunity for a minor to convince a neutral decisionmaker that she is entitled to a bypass if she is mature or if an abortion without parental notification would be in

her best interests. App. 21-24. The court of appeals cited record evidence indicating that there are many "best interests" minors who are neither abused nor neglected within the meaning of the statute. App. 24.

The court of appeals also found that the statute fails to provide an adequate alternative even for the abused and neglected minors it purports to reach. It found, based on record evidence, that minors are reluctant to report abuse and will turn to desperate measures, including suicide, if pushed to a choice between notifying an abusive parent and reporting that abuse. App. 25. It also found that the statute fails to protect the confidentiality of minors who report abuse because of numerous ways in which a minor's abortion may be revealed in the course of a juvenile court child abuse proceeding. The court concluded that "Planned Parenthood has shown that a large fraction of minors seeking pre-viability abortions would be unduly burdened by South Dakota's parental notice statute, despite its abuse exception." App. 25.

REASONS FOR DENYING THE WRIT

I. THE STANDARD FOR FACIAL CHALLENGES TO ABORTION STATUTES, INCLUDING THE TYPE OF STATUTE AT ISSUE IN THIS CASE, IS SETTLED.

For twenty-four years, this Court has consistently adjudicated facial challenges to abortion restrictions, and declared those restrictions unconstitutional, when they imposed an impermissible burden "in a large fraction of the cases in which [they were] relevant. . . ." *Planned Parenthood v. Casey*, 112 S. Ct. at 2830. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (striking law banning all abortions on its face because it was unconstitutional as to pre-viability abortions and abortions necessary for the health of the woman); *City of Akron v. Akron Center for Reproductive Health (Akron I)*, 462 U.S. 416 (1983) (striking hospitalization requirement as over-broad as applied to most second-trimester abortions). This Court never has required a showing that there are no circumstances in which the restriction could be constitutionally applied. *Cf. United States v. Salerno*,

481 U.S. at 745.[1]

This approach and the consistency of its application are particularly clear in cases such as the one at issue here, involving requirements of parental involvement in a minor's decision about abortion. This Court has invalidated such statutes on facial challenges despite explicit recognition that the statutes could be applied constitutionally to immature minors who would benefit from their operation. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976). *Bellotti v. Baird*, 443 U.S. 622, 648 (1979) *Akron I*, 462 U.S. at 439-40. *Hodgson v. Minnesota*, 497 U.S. 417, 461 (1990) (O'Connor, J. concurring). This Court never has required the challenging party to demonstrate that the statute could not be constitutionally applied to any minor.

The reasons for the rejection of the *Salerno* approach are obvious. Forcing each minor to mount a constitutional challenge to the law "as applied" to her would be a practical impossibility. The delays inherent in this approach would lead to evaporation of the very right the minor sought to assert. This Court therefore has ruled that state laws requiring the consent of or notice to a parent must contain a procedure (bypass) whereby the constitutional and unconstitutional applications of such laws are sorted out before the minor's opportunity to obtain an abortion is lost. *Bellotti v. Baird*, 443 U.S. 622 (striking a parental consent law that failed to make adequate exceptions for mature minors and those for whom an abortion would be in their best interests); *Akron I*, 462 U.S. at 440; *Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 476, 491-94 (1983); *Hodgson*

[1] Although this Court has cited *Salerno* in some reproductive privacy cases, it was for the proposition that federal courts should not strike down a statute merely because it may have some unconstitutional applications, as for example a judicial bypass that could, in a worst case scenario, take a long time to complete. *Ohio v. Akron Center for Reproductive Health (Akron II)*, 497 U.S. 502, 514 (1990). This is a far cry, however, from upholding a statute merely because it has some constitutional applications.

v. Minnesota, 497 U.S. 417; *Casey*, 112 S. Ct. at 2832 (reaffirming that parental consent laws must contain a judicial bypass).

This Court's consistent rulings on abortion in general and minors in particular reject *Salerno*. That case never has been and should not be applied to reject facial challenges to laws requiring parental involvement in minors' abortions merely because such laws may have some constitutional applications. The federal courts are not confused about the appropriate standards and Petitioners fail to demonstrate a reason to grant certiorari on this issue.[2]

II. THE QUESTION OF WHETHER A JUDICIAL BYPASS IS REQUIRED FOR ONE-PARENT NOTICE STATUTES IS NOT A QUESTION OF NATIONAL IMPORTANCE, NOR IS THERE ANY CONFLICT IN THE LOWER FEDERAL COURTS ON THIS SUBJECT.

This Court consistently has required that parental notice or consent laws provide a minor an opportunity to convince an independent decisionmaker that she should be exempted from the

[2] The federal courts consistently have applied *Casey's* "large fraction" test. *A Woman's Choice East Side Women's Clinic v. Newman*, 1995 WL 678345 (S.D. Ind. Nov. 9, 1995); *Utah Women's Clinic v. Leavitt*, 844 F. Supp. 1482 (D. Utah 1994); *Planned Parenthood v. Miller*, (App.); *See also, Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (on remand) (dicta). Only the fifth circuit continues to cite *Salerno* as the applicable standard. *Barnes v. Moore*, 970 F.2d 12, 14 & n.2 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 656 (1992). At least one district court in that circuit, however, continues to recognize that, despite the literal language of *Salerno*, a viable bypass is necessary to sort out the constitutional and unconstitutional applications of parental involvement statutes. *Causeway Medical Suite v. Ieyoub*, 1995 WL 626201 (E.D. La. Oct. 24, 1995).

law's requirement if she is mature or if an abortion would be in her best interests. This Court unambiguously reaffirmed these holdings in *Casey*, upholding a parental consent law because it contained such an alternative. 112 S. Ct. at 2832. *See also Hodgson* 497 U.S. at 417-19 (striking a requirement of notification to two parents because of the lack of a bypass).[3]

Every lower court to consider the issue has held that this Court's decisions on parental involvement mandate that a bypass is a necessary adjunct to a parental notification law, whether it requires notice to one or both parents. *Planned Parenthood v. Miller*, App.; *Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985) (holding requirement of a bypass applies to both notice and consent laws), *aff'd by an equally divided court*, 484 U.S. 172 (1987); *Indiana Planned Parenthood Affiliates Association v. Pearson*, 716 F.2d 1127 (7th Cir. 1983) (striking one-parent notification law for lack of a sufficient judicial bypass); *Akron Center for Reproductive Health v. Slaby (Akron II)*, 854 F.2d 852, 860-61 (6th Cir. 1988), *rev'd on other grounds*, 497 U.S. 502 (1990); *Orr v. Knowles*, slip op. No. CV 81-0-301 (D. Ne. Feb. 20, 1991) (Court of Appeals Joint Appendix at 73), *appeal dismissed as moot sub nom. Epp. v. Kerrey*, 964 F.2d 754 (8th Cir. 1992) (refusing to vacate injunction against one-parent notification law that lacked an adequate judicial bypass); *Wicklund v. Salvagni*, No. 93-92-BU-JFB slip op. at 4-5 (D. Mt. Sept. 27, 1995) (striking as unconstitutional one-parent notification law that lacked a sufficient judicial bypass) (Appendix to this Brief); *Wicklund v. Salvagni*, No. 93-92-BU-JFB (D. Mt. Dec. 21, 1993) (striking as unconstitutional parental notification law that locked a judicial bypass) (Court of Appeals Joint Appendix at 516). *See also, Causeway Medical Suite v. Ieyoub*, 1195 WL 626201 (E.D. La. Oct. 24, 1995) (striking parental consent law because judge hearing bypass petition could notify a minor's parent).

[3] *Hodgson* makes clear that petitioners are incorrect in stating that this Court has never decided that a notice statute requires a bypass. Petition at 8 and 12.

Moreover, with the solitary exception of the State of South Dakota, every state that has enacted a one-parent notification law in the past fifteen years has included a judicial or other waiver option.[4] Petitioners' desire to make a test case out of this issue does not bootstrap it into one of national importance warranting this Court's review.

Equally unpersuasive is Petitioners' claim that this case is of national importance because it involves the "legal nature of the parent-child relationship" and the state's ability to enhance that relationship. Petition at 11. This Court has always been cognizant of parental interests in deciding the validity of parental involvement laws. *Bellotti*, 443 U.S. at 637-38; *Hodgson*, 497 U.S. at 446-47. Nonetheless, the Court has consistently struck down laws that fail to provide an alternative to parental involvement for mature or best-interest minors because the "justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interest of the child." *Hodgson*, 497 U.S. at 454, (citing *Bellotti*, 443 U.S. at 651).

In summary, Petitioners fail to justify their request that this Court grant certiorari to decide what weight should be afforded parents' interests in their daughters' abortion decisions. This issue was resolved long ago.

III. THE UNDUE BURDEN TEST IS THE SETTLED STANDARD OF REVIEW FOR ABORTION LEGISLATION.

In *Planned Parenthood v. Casey*, 112 S. Ct. 2791, this

[4] Ark. Code Ann. § 20-16-801 to 808 (1994); 24 Delaware Code 1781-1789 (1995); Ga. Code Ann. § 15-11-110 to 118 (1994); 1995 Ill. ALS 18 (1995); Kan. Stat. Ann. § 65-6705 (1993); Md. Health-Gen. Code Ann. § 20-103 (1994); Neb. Rev. Stat. § 71-6901 to 6909 (1994); Nev. Rev. Stat. Ann 442.255, 442.2555 (Michie 1993); Ohio Rev. Code Ann. 2929.12 (Baldwin 1994); W. Va. Code 16-2F-1 to 9 (1995).

Court announced that henceforth abortion laws would be judged by the "undue burden" standard. The *Casey* Court made clear that its decision was intended as definitive, clarifying and setting aside any prior inconsistent views on the "standard of review" question. *Id.* at 2820. Moreover, *Casey* specifically applied the "undue burden" standard to parental involvement laws. *Id.* at 2821, 2832.

Contrary to Petitioners' argument, the majority of the Court in *Hodgson v. Minnesota* did not state that the rational basis standard should be used to test the constitutionality of laws requiring parental notice of a minor's abortion decision. Petition at 11. Rather, the Court ruled that a Minnesota law that lacked a judicial bypass did not even pass the rational basis test, making it unnecessary for the Court to apply any higher standard of review. 497 U.S. at 450.

Petitioners have not identified a single court that has adopted the "rational relationship" test for abortion laws affecting minors or even considered doing so. There is no lack of clarity on this subject, no conflict between the decision of the court below and prior decisions of this Court, and therefore no reason to grant certiorari on this issue.

IV. THE COURT OF APPEALS' DECISION FAITHFULLY FOLLOWS THIS COURT'S UNDUE BURDEN ANALYSIS.

Petitioners argue that the court of appeals misapplied the undue burden standard to the facts of this case. However, "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Petitioners' claims amount to no more than that and, therefore, even if correct, do not merit review by this Court. Nevertheless, as shown below, the court of appeals correctly applied the undue burden analysis laid out in *Casey* and Petitioners' claims of error are incorrect.

According to *Casey* a court must analyze an abortion statute to determine whether, as a practical matter, it poses a

substantial obstacle to effectuation of the abortion decision for a large fraction of the women it affects. For example, in *Casey*, this Court struck down a husband notification requirement because, although it did not give husbands a legal veto power over their wives' abortions, as a practical matter it would deter a significant number of women from seeking abortions out of fear for their own safety as well as that of their children. 112 S. Ct. at 2829-30.

The court of appeals applied exactly this analysis, finding that the South Dakota one-parent notice statute, as a practical matter, gave parents an opportunity to obstruct their daughters' access to abortion. App. at 17. Moreover, it cited record evidence that a requirement of parental notification could work substantial harm in already disturbed families, lead to abuse of minors, deter some minors from seeking abortions, and even lead some to suicide. App. 23-25. It concluded that in a large fraction of cases minors would be unduly burdened by a one-parent notice requirement without a bypass. *Id.*

Petitioners' various claims as to error must fail in light of the foregoing.

▸ Petitioners are wrong in asserting that the finding of an undue burden, and the consequent need for a judicial bypass, is somehow dependent on whether a statute creates a legally binding "veto power" over a minor's abortion. Petition at 12-13. In *Hodgson*, this Court struck down a two-parent notification statute, which did not provide for such a veto, because it failed to provide for a judicial bypass. 497 U.S. at 450 and 459-60 (O'Connor, J., concurring). *See also Bellotti* (striking a parental consent law because it failed to allow a minor to seek a judicial bypass without notifying her parent).

▸ A finding of an undue burden also does not depend on whether a statute requires notice to one or both parents. Petition at 13-15. Applying *Casey's* functional test, the court of appeals found that both one- and two-parent notice laws create obstacles in the path of a minor by giving her parents an opportunity to

block her access to abortion services; both create the opportunity for retaliation, abuse, and disruption of the family. App. 14, 18 and 24. These obstacles amount to an undue burden, regardless of whether one or both parents are to be notified. App. 18. [5]

▸ Petitioners incorrectly fault the court of appeals for holding that mature minors have a right to avoid parental notification. Petition at 15-17. The court of appeals' ruling on this subject comports with every ruling of this Court and of numerous lower federal courts that mature minors are entitled completely to avoid parental involvement. *Bellotti v. Baird*, 443 U.S. at 643, *Akron II*, 497 U.S. at 522 (Stevens, J., concurring in part and concurring in the judgment), *Hodgson v. Minnesota*, 497 U.S. at 461 (O'Connor J., concurring). *See, e.g. Zbaraz v. Hartigan*, 763 F.2d at 1539; *Indiana Planned Parenthood Affiliates v. Pearson*, 716 F.2d at 1134; *Orr v. Knowles*, slip op. (Court of Appeals Joint Appendix at 73).

▸ Contrary to Petitioners' assertion, Petition at 17-18, the court of appeals was correct in holding that the South Dakota statute fails to provide a sound alternative for abused minors. In

[5] Moreover, the court of appeals made the specific finding that "roughly eighteen percent of minors live in single parent homes; many of them, as a practical matter have only one parent to notify." App. 24 n.10. The court cited these data to show the harms minors face under a one-parent notice statute when the custodial parent is abusive or nonsupportive and the minor has no other parent to whom she can turn. In criticizing the court of appeals' reliance on these data, Petitioners cite *Hodgson* for the proposition that evidence of harm to minors living in single-parent homes is relevant only when the statute at issue requires notice to two parents. Petition at 14. *Hodgson* does not support this proposition. Nothing in *Hodgson* forecloses a finding that a one-parent notice statute harms minors from single-parent homes. In fact, Justice O'Connor held in *Hodgson* that the judicial bypass was necessary to provide an option for the minor who could not notify either parent. 497 U.S. at 461 (O'Connor, J., concurring).

Casey this Court recognized that:

> Secrecy typically shrouds abusive families. Family members are instructed not to tell anyone, especially police or doctors, about the abuse and violence. Battering husbands often threaten their wives or her children with further abuse if she tells an outsider of the violence and tells her that nobody will believe her.

112 S. Ct. 2827. These conclusions as to the constitutional inadequacy of husband notice echoed the conclusions in *Hodgson* about the harms of a parental notification requirement without a judicial bypass. In *Hodgson v. Minnesota*, Justice O'Connor specifically ruled that the statute's exception for reported abuse was not a viable alternative, in part, because of the reluctance of minors to report abuse. 497 U.S. at 460 (O'Connor J., concurring, citing *Casey* at 440 n.26).

The South Dakota exception is no more viable because, as found by the court below, South Dakota minors will undertake drastic measures to avoid revealing abuse. App. 25. Petitioners' dispute with these factual findings does not warrant a grant of certiorari. Supreme Court Rule 10. [6]

[6] Petitioners argue that this Court's approval of a bypass for best-interests minors means the minor will have to reveal the abuse anyway in order to obtain a waiver. Petition at 18. So, according to the Petitioners, they are providing minors with a less oppressive option by letting them reveal abuse to the physician. This Court however, never has approved a bypass statute that requires a minor to reveal abuse in order to obtain a waiver of a parental consent or notice requirement. A minor unwilling to reveal abuse could demonstrate that she is mature or that an abortion without parental involvement is in her best interests for some other reason. In contrast, an abused minor in South Dakota seeking an abortion must choose between revealing the abuse and informing an abusive parent of her intention to have an abortion. This is the very choice this Court has disapproved. *Hodgson*, 497 U.S. at 439 and n.26.

▸ Contrary to Petitioners' argument, Petition at 19-20, the court of appeals correctly found that the "'bypass' for abused and neglected minors falls short in protecting the confidentiality of the minor's decision to have an abortion." App. 20. Although the South Dakota statute instructs agencies that investigate and prosecute child abuse cases not to reveal to parents that their daughter sought an abortion, the statute fails to extend this exhortation to juvenile courts that hear child abuse cases. The South Dakota discovery statutes governing abuse and neglect proceedings in juvenile court provide numerous opportunities for information about the minors' abortion to be revealed in the course of those proceedings. App. 21 and statutes cited therein.

Petitioners are mistaken in asserting that juvenile courts would have to disregard the discovery mandates of these statutes in favor of the later-enacted abortion law. The abortion law does not apply to juvenile court proceedings; thus, it does not supersede the discovery statutes. The court of appeals' judgment on this issue of state law is entitled to deference by this Court, *Frisby v. Schultz*, 487 U.S. 474, 482 (1988), and does not merit certiorari.

CONCLUSION

The standard to be applied to facial challenges to abortion laws is well settled. Petitioners raise no federal questions of national importance to resolve in this case and all aspects of the court of appeals' decision are fully consistent with the decisions of this Court. The petition for certiorari should be denied.

Respectfully submitted,

Dara Klassel
(Counsel of Record)
Roger Evans
Eve W. Paul
Legal Action for Reproductive Rights
Planned Parenthood Federation of America
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

Colleen K. Connell
The Roger Baldwin Foundation of ACLU, Inc.
203 N. LaSalle, #1405
Chicago, Illinois 60601
(312) 201-9740

Catherine Weiss
Louise Melling
Steven Shapiro
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

December 28, 1995

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

SUSAN WICKLUND, M.D., et al.,	)	
	)	
Plaintiffs,	)	No. CV 93-92-BU-JFB
v.	)	
	)	MEMORANDUM AND
	)	ORDER
MICHAEL SALVAGNI, in his	)	
individual capacity and	)	
in his official capacity	)	
as Gallatin County Attorney	)	
	)	
Defendant.	)	

Pending before the Court are cross-motions for Summary Judgment by Plaintiffs and Defendant. To expedite the decision, and with the parties' concurrence, the matters raised are deemed submitted without the need for oral argument. After considering the briefs and supporting documents submitted, the Court rules as follows.

This action was originally filed on November 23, 1993. The Plaintiffs sought an order enjoining Defendant from enforcing from enforcing Mont. Code Ann. § 50-20-107(1)(b), which required parental notification before an abortion could be performed on a minor. This Court entered a Temporary Restraining Order on November 30, 1993 enjoining Defendant from enforcing Mont. Code Ann. § 50-20-107(1)(b). The temporary Restraining Order remained in effect until the Court entered a final judgment on December 21, 1993. The Judgment based on the parties' stipulation, permanently enjoined enforcement of Mont. Code Ann. § 50-20-107(1)(b) because it was unconstitutional. On July 17, 1995, this Court granted Plaintiffs'

Motion for Leave to File a Supplemental Complaint. Plaintiffs are currently contesting the constitutionality of HB 482, a new parental notification provision that was signed into law by Montana Governor Marc Racicot on April 15, 1995.[1] The law is scheduled to go into effect on October 1, 1995.

The Plaintiffs and Defendant agree that it is a matter of law to be decided by the Court as to whether HB 482 is constitutional. The law at issue requires parental notice for unemancipated minors and incompetent persons seeking abortions. HB 482, § 4.[2] An "emancipated minor" is defined as "a person under 18 years of age who is or has been married or who has been granted an order of limited emancipation by a court as provided in 41-3-406." HB 482 § 3(3). Section 9 provides for judicial waiver of the notice requirement and is at the heart of the motions presently pending. Section 9 provides that a minor "may petition the youth court for a waiver of the notice requirement and may participate in the proceedings on the person's own behalf." The petition may be granted by the youth court and the notice requirement waived pursuant to four different alternatives. These include:

(1) "If the court fails to rule within 48 hours and time is

---

[1] The law is entitled "AN ACT REQUIRING PARENTAL NOTIFICATION PRIOR TO AN ABORTION FOR A MINOR OR INCOMPETENT PERSON; PROVIDING A JUDICIAL WAIVER OF NOTIFICATION; PROVIDING PENALTIES; AMENDING SECTION 41-1-405, MONT. CODE ANN.; AND REPEALING SECTION 50-20-107, MONT. CODE. ANN." A copy of the law is attached as an Appendix to this ruling.

[2] Section 4 provides: Notice of parent required. A physician may not perform an abortion upon a minor or an incompetent person unless the physician has given at least 48 hours actual notice to one parent or to the legal guardian of the pregnant minor or incompetent person of the physicians's intention to perform the abortion.

not extended." § 9(3).

(2) If the court finds that petitioner is "sufficiently mature to decide whether to have an abortion." § 9(4).

(3) If the court finds that "there is evidence of a pattern of physical, sexual, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian." § 9(5)(a).

(4) If the Court finds that "the notification of a parent or guardian is not in the best interests of the petitioner." § 9(5)(b).

Plaintiffs claim that Section 9 of HB 482 is unconstitutional for four reasons.[3] First, because a minor must petition the youth court for a waiver of notice, the Plaintiffs argue that Mont. Code. Ann. § 41-5-500(1), which requires service of a summons on a petitioner's parents after a petition is filed in youth court, effectively notifies the minor's parents of the judicial waiver procedure.[4] Second, Plaintiffs argue that the provision

---

[3] The Plaintiffs assert in a footnote that HB 482 is also invalid because section 7, which provides that "public assistance benefits may not be used [by an emancipated minor] to obtain an abortion," violates Title XIX and the Hyde Amendment. See, Pls' Br. In Supp. of Pls. Mot. for Summ. J., p.6 n.3 (citing Planned Parenthood of Missoula Inc. v. Blouke, 858 F.Supp. 137 (D. Mont. 1994)). The Court will not address this issue because it was not properly raised and briefed. Plaintiff also initially challenged the lack of an expedited appeals procedure for the judicial bypass proceedings. However, in the interim the Montana Supreme Court has adopted such a procedure and Plaintiffs' challenge to the adequacy of the bypass provision on that basis is therefore moot.

[4] Mont. Code Ann. § 41-5-502. Summons. (1) After a petition has been filed, summons must be served directly to: (a) the youth; (b) his parent or parents having actual custody of the youth or his

allowing for waiver if notification of the parents would not be in the best interests of the petitioner, improperly narrows the consideration of what is in the minor's overall "best interests." Glick v. McKay, 937 F.2d 434, 438 (9th Cir. 1991). Third, Plaintiffs argue that if the minor seeks a waiver of notification based on abuse, constructive notice to the minor's parents will occur because the youth court will initiate an investigation of the home pursuant to Mont. Code Ann. § 41-3-202. Finally, Plaintiffs argue that the statute violates the Equal Protection Clause of the U.S. Constitution. Defendant has moved for summary judgment on the first, third and fourth claims. Plaintiffs have filed a cross-motion for summary judgment on the first, second and third grounds. Because the Court decides the motions in favor of Plaintiffs on the basis of the second ground, concerning the scope of the "best interests" inquiry, it will not address the remaining grounds for summary judgement asserted by either party.

A. Best Interests Inquiry

One ground for summary judgment raised by Plaintiffs concerns the scope of the "best interests" inquiry to be conducted by the youth court, in determining whether judicial bypass of the notice requirement is appropriate. The United States Supreme Court has stated that in judicial bypass proceedings in the context of a parental consent statute,

> A pregnant minor is entitled to show the court either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Bellotti v. Baird, 443 U.S. 622, 640-642 (1979); see also Ohio v.

---

guardian or custodian, as the case may be; and (c) other person as the court may direct.

Akron Center for Reproductive Health ("Akron Two"), 497 U.S. 502, 511 (1990). It is also well established that because of the greater intrusiveness of parental consent requirements, a notice-bypass provision that meets the requirements of a consent-bypass provision passes constitutional muster. Akron II, 497 U.S. at 511. Plaintiffs do not contend that the Montana parental notification statute does not meet the first requirement, and the Court specifically finds that it does. However, the "best interests" inquiry under Bellotti requires that in judicial bypass proceedings, a minor be given a chance to show that the abortion would be in her best interests. This is noticeably different than the inquiry under the Montana statute, which waives notification only if the Court first finds that notification would not be in the minor's best interests. The Eleventh Circuit Court of Appeals has noted the connection between these two standards, but did not believe that the difference was "constitutionally significant." See Planned Parenthood Ass'n of Atlanta v. Miller, 934 F.2d 1462, 1477 n.21 (11th Cir. 1991). However, the Ninth Circuit Court of Appeals, which controls this Court's decisionmaking, has a different view.

In Glick v. McKay, 937 F.2d 434 (9th Cir. 1991), the Ninth Circuit Court of Appeals applied the Bellotti standards for a parental consent judicial bypass statute to a notification statute, and found that it did not pass constitutional muster because the statute required an inquiry into whether notification, not abortion, was in the minor's best interests. Id. at 439. The Glick court quoted Bellotti, stating that

> "[i]f, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement." Bellotti, 443 U.S. at 648, 99 S. Ct. at 3050 (emphasis added). Therefore, the Nevada statute impermissibly narrows the Bellotti "best interests" criterion, and is unconstitutional.

Id. However, the Glick Court did not expressly hold that parental consent bypass standards apply in a notice context; instead, the

statute was found unconstitutional on other grounds and the Bellotti problem "only [added] to the infirmity." Id. at 442.

In the context of a parental consent statute, the Court would have no problem applying Glick to determine that a judicial bypass provision focusing the "best interests" inquiry upon the narrow issue of notification, rather than the broader issue of whether an abortion is in the minor's best interests, is unconstitutional. However, the present case involves a parental notification statute, not a parental consent statute. Neither the U.S. Supreme Court nor the Ninth Circuit Court of Appeals have expressly decided what, if any, are the requirements of a judicial bypass procedure in a parental notice, as opposed to a parental consent, statute. This Court looks to other circuits for guidance on the issue.

The Eighth Circuit Court of Appeals has addressed the same issue, and is the only one to have done so in a fairly thorough manner. See Planned Parenthood, Sioux Falls Clinic, v. Miller ___ F.3d ___, 1995 WL 513959 (8th Cir. (S.D. 1995)). In Miller, the court began by noting that "the Supreme Court has established that the State may require parental notice for immature minors who cannot show that an abortion would be in their best interests." Id., 1995 WL 513959 at *5 (citing H.L. v. Matheson, 450 U.S. 398, 409 (1981)). However, "the Supreme Court has yet to decide whether a mature or "best interests" minor is unduly burdened when a State requires her physician to notify one of her parents before performing the abortion." Id. To resolve that issue, the Eighth Circuit considered the reasons why "requiring parental notice--or, for that matter parental consent-- is not an undue burden upon immature minors who cannot show that an abortion would be in their best interests." Id. The answer, in the view of the Eighth Circuit, "is that they are minors, and States may impose requirements on immature minors that it may not impose on adults." Id. at *6 (citations omitted).

When dealing with a mature minor, the state's attempt to give parents power over the abortion decision is on a collision course with the Constitution. Id. (citing Bellotti, 443 U.S. at 643-

44 & n.23). "By showing that they are capable of mature, informed consideration, such minors establish that the State has no legitimate reason for imposing a restriction on their liberty interests that it could not impose on adult women." Id.

In the case of an immature minor whose best interests would be served by having an abortion, "the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child." Id. (quoting Hodgson v. Minnesota, 497 U.S. 417, 454 (1990)). "But if the minor can show that an abortion without notification would be in her best interest, then the State has no further reason for requiring such notice." Miller, 1995 WL at *5.

> For both mature and "best interest" minors, then, the State has no legitimate interest in imposing a parental notice requirement with the purpose or effect of placing a substantial obstacle in their paths when they seek pre-viability abortions. For this reason, we hold that the State may not impose a parental-notice requirement without also providing a confidential, expeditious mechanism by which mature and "best interest" minors can avoid it. In short, parental notice provisions, like parental-consent provisions, are unconstitutional without a "Bellotti-type bypass."

Id. (emphasis added).

This Court agrees with the thoughtful reasoning of the Eighth Circuit, and further believes that the Ninth Circuit, having held in Glick that a notice-bypass provision must meet constitutional scrutiny, see Glick, 937 F.2d at 442, would also apply the Bellotti standards to determine the scope of the "best interests" inquiry required. See also Zbaraz v. Hartigan, 763 F.2d 1532, 1539 (7th Cir. 1985), aff'd, 484 U.S. 171 (1988), (parental notice statute could only withstand constitutional scrutiny if it provided a bypass procedure consistent with Bellotti II) (citing Indiana Planned Parenthood Affiliates Ass'n. v. Pearson, 716 F.2d

1127 (7th Cir. 1983)). After all, the failure of the Nevada statute to meet the Bellotti standards was one of the two reasons given for holding the parental notice statute unconstitutional. Glick, 937 F.2d at 442. Under Bellotti, and Glick,[5] a minor must have an opportunity to show not just that notification is not in her best interests, but that having an abortion is in her best interests. The Montana judicial bypass statute does not conform with the Bellotti standards, impermissibly narrows the scope of the "best interests" inquiry, and places an undue burden upon the right of a minor who is able to show that abortion is in her best interests, to obtain an abortion without parental involvement. It is therefore unconstitutional.

B. Arnott's Renewed Motion to Intervene

Finally, there is a "Renewed Motion to Intervene as Defendant by Representative Arnott." This Motion was filed on September 14, 1995, three days after the Court denied Representative Arnott's original Motion to Intervene. Representative Arnott argues that she should have the opportunity to intervene because her interests are not adequately represented by the Attorney General. She bases this argument on the fact that the Attorney General has not filed a motion to sever Section 12 of HB 482, from the rest of the bill.[6] However, the Defendant has

---

[5] Defendant argues that Glick is no longer good law, after Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992). However, nothing in Casey alters the Court's reasoning above. To the contrary, Casey reaffirms that the State may not unduly burden a minor's access to abortion. Casey, 112 S. Ct. at 2831. As noted above, the imposition of a notification requirement without an adequate Bellotti-type bypass provision, would constitute an undue burden upon the right of a mature or "best interests" minor to have an abortion.

[6] Section 12 provides: RIGHT OF INTERVENTION. PURSUANT TO RULE 24(A), MONTANA RULES OF CIVIL PROCEDURE, A LEGISLATOR HAS THE RIGHT TO INTERVENE IN ANY CASE IN WHICH THE LEGALITY OF TITLE 50, CHAPTER 20, IS CHALLENGED.

stated that section 12 is severable and that the motions at issue only address the constitutionality of sections 1-10 of HB 482. See Com. Rep. Br. in Supp. of Def's Mot. for Summ. J., p.16 n.5. The Court concludes that this is not a proper basis for Arnott to intervene and further concludes that any potential interests of Arnott are, as previously stated in the Memorandum and Order of September 11, 1995, adequately represented. Wherefore,

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment is granted and Defendants' Motion for Summary Judgment is denied. Sections 1 through 10 of Montana HB 482 are hereby declared unconstitutional, and Defendant is permanently enjoined from enforcing those sections.

IT IS FURTHER ORDERED that the Representative Arnott's Renewed Motion to Intervene is denied.

The Clerk is directed to enter Judgment accordingly and notify counsel of record and Mr. Timothy J. Whalen of this Order.

DONE AND DATED this 27th day of September, 1995.

James F. Battin
Senior U.S. District Judge

No. 95-856

(3)

Supreme Court, U.S.
FILED
JAN 2 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

WILLIAM J. JANKLOW, GOVERNOR,
AND MARK W. BARNETT, ATTORNEY GENERAL,
IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

PLANNED PARENTHOOD, SIOUX FALLS CLINIC,
BUCK J. WILLIAMS, M.D., AND
WOMEN'S MEDICAL SERVICES, P.C.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF PETITIONERS

James Bopp, Jr.
Counsel of Record

John K. Abegg
Bopp, Coleson & Bostrom
2 Foulkes Square
401 Ohio Street
P.O. Box 8100
Terre Haute, IN 47808
(812) 232-2434

Mary B. Spaulding
James Bradley Gehrke
National Right to Life Committee
419 7th Street, N.W. Suite 500
Washington, D.C. 20004
Telephone (202) 626-8815

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28 pp

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF A PETITION FOR CERTIORARI

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, *Amicus Curiae* National Right to Life Committee, Inc., respectfully moves the Court to allow it to file a brief in support of the Petition For Certiorari in the instant matter. In support of this motion, your *amicus* states as follows:

1. Your *amicus* has obtained the written consent of the Petitioner in this action to file the requested brief; said consent is submitted to the Clerk contemporaneously with this motion. The Respondent has refused to grant consent to this brief.

2. This brief will bring relevant matter to the attention of the Court which has not been submitted by the parties and will bear on the need for this Court to grant said Petition.

3. It will discuss the views of individual justices of this Court regarding the constitutionality of a one-parent notification statute without the presence of a judicial bypass for minors seeking abortions. It will also discuss in detail the efficacy of, as well as the concomitant need for, such a bypass.

4. Finally, it will analyze in detail the differing positions of the justices of this Court regarding the continuing viability of the facial challenge rule to abortion statutes, as well as the resultant confusion among the lower federal courts on this issue.

WHEREFORE, your *amicus* respectfully prays that the Court grant its motion to file a brief *amicus curiae* in support of the Petition for Certiorari in the case at bar.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record

John K. Abegg
Bopp, Coleson & Bostrom
2 Foulkes Square
401 Ohio Street
P.O. Box 8100
Terre Haute, IN 47808
(812) 232-2434

Mary B. Spaulding
James Bradley Gehrke
National Right to Life Committee
419 7th Street, N.W. Suite 500
Washington, D.C. 20004
Telephone (202) 626-8815

Counsel for Amicus Curiae

QUESTIONS DEALT WITH HEREIN

1. Whether this Court should grant the Petition For Certiorari in order to correct the error of the Court Of Appeals that the Constitution requires a one-parent notification abortion statute to contain a judicial bypass where this notice requirement is waived for a broadly defined class of abused and neglected minors?

2. Whether this Court should grant the Petition For Certiorari in order to clarify the standard for evaluating facial challenges to abortion statutes in light of *Planned Parenthood of S.E. Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), and to resolve the confusion among the circuits regarding the appropriate test to apply in this context.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Pages

CASES

TABLE OF AUTHORITIES – Continued

Pages

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The National Right to Life Committee, Inc. (NRLC), is a nonprofit organization whose purpose is to promote respect for the worth and dignity of human life until the time of natural death, including the lives of unborn persons. It is a non-partisan, non-sectarian federation of fifty state right-to-life groups, made up of approximately 3,000 local chapters. NRLC is governed by a board of directors comprised of one representative from each of the fifty states and the District of Columbia, as well as three at-large directors. NRLC is made up of individuals from every race, creed, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to further its purpose.

The members of NRLC have been the primary supporters of laws protecting innocent human life from the time of conception until the time of natural death. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of NRLC have supported legislation to protect unborn human life within these guidelines, including the legislation at issue in the case at bar. By means of this brief, NRLC seeks to advance its interests by addressing the legal issues herein.

SUMMARY OF ARGUMENT

This Court has recognized that protecting its minor citizens is a legitimate interest which the state may advance by requiring minors to notify their parents before they obtain an abortion. In this regard, a majority of this Court has indicated that requiring only one-parent notification advances this interest without interfering with a minor's constitutional rights; a judicial bypass is not needed as an additional safeguard. Moreover, the evidence shows that far from assisting a minor with this

difficult decision, such a bypass actually places additional, and unnecessary, stress upon her. Thus, because the lower court held that South Dakota's one-parent notification law was unconstitutional for lacking a bypass, it erred. This Court should grant the petition to correct this error and thereby allow South Dakota and her sister states to utilize an important tool in furthering the best interests of their youngest citizens.

In addition, the lower court rejected the standard for evaluating facial challenges outside the First Amendment context set forth in *United States v. Salerno*, 481 U.S. 739 (1987), and reaffirmed in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). This approach by the Eighth Circuit, though in harmony with that of the Third Circuit, is at odds with the approach taken by the Fifth Circuit, and stems from the conflicting views articulated by the justices of this Court in *Planned Parenthood of S.E. Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992). Subsequent opinions have repeated these conflicting views, which has only heightened the confusion among the circuits regarding the appropriate standard to apply in evaluating facial challenges to abortion laws. This Court should grant the petition to clarify the law on this issue.

REASONS FOR GRANTING THE WRIT

I. WHETHER A JUDICIAL BYPASS PROVISION IS REQUIRED IN A SINGLE-PARENT NOTICE ABORTION STATUTE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT – PARTICULARLY BECAUSE THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS AT ODDS WITH THE VIEWS OF MEMBERS OF THIS COURT.

This Court has observed that "[t]he welfare of the child has always been the central concern of laws with

regard to minors," and that to satisfy this concern, the State may pass laws which "protec[t] . . . the right of each parent to participate in the upbringing of his or her own children." *Hodgson v. Minnesota*, 497 U.S. 417, 482-483 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part). In this regard,

> [t]here can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.

Bellotti v. Baird, 443 U.S. 622, 640-641 (1979), (opinion of Powell, J.). The reason for involving parents in such a decision is that

> [t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

In the case at bar, South Dakota has attempted to advance these two interests, protecting the welfare of minors and safe-guarding the role of their parents, by providing that an unemancipated minor who seeks an abortion must first notify her parents of this contemplated decision, unless it would not be in her best interests to do so; this general caveat to the parental notice requirement is codified in the statute with a series of broad exceptions. *App.* at 84. As will be discussed, *infra*, in passing this provision, South Dakota has followed the pronouncements of this Court with regard to safeguarding minors' interests, while at the same time refusing to

abdicate its *responsibility* as an "ultimate guardia[n] of the liberties and **welfare** of the people in quite as great a degree as the courts." *Missouri, K. & T.R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.) (emphasis added).

Nevertheless, the court of appeals struck down the statute as unconstitutional. Because this decision disregards the views of members of this Court and deprives South Dakota and her sister states of an effective tool for furthering the welfare of its minor citizens, the Court should grant the petition for certiorari.

A. Prior Rulings Of This Court Do Not Mandate A Judicial Bypass For One-Parent Notification Statutes.

As intimated, *supra*, members of this Court have identified two state interests for requiring parental *notification* when minors seek abortions: "the State's interest in the welfare of pregnant minors" and "the State's interest in acknowledging and promoting the role of parents in the care and upbringing of their children." *Hodgson*, 497 U.S. at 482 (Kennedy, J., concurring in the judgment in part and dissenting in part). In the context of a *two*-parent notification requirement, this Court has noted that in certain cases, e.g., where the minor is a victim of physical or sexual abuse, either it may not be in the best interests of minors to notify their parents that they are seeking abortions or they may not in fact do so, *id.* at 438-440; as a result, it has required a mechanism whereby minors may bypass the parental notification requirement, e.g., a judicial bypass,[1] and thereby obtain abortions. *Id.*

[1] The judicial bypass requirement originated in the context of parental *consent* requirements for minors to obtain abortions. *Bellotti v. Baird*, 428 U.S. 132 (1976). The reason for the bypass was to remove the possibility that a third party, i.e., the minor's parent, would "veto" the minor's decision whether to terminate her pregnancy. *Planned Parenthood Of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) ("The State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy."). In the case at bar, however, the provision at issue is **not** a parental consent requirement, but rather is a parental notification requirement; thus, the concern that a minor's parent may bar her ability to obtain an abortion is, by definition, not implicated.

at 461 (O'Connor, J., concurring in part and concurring in the judgment in part); *id.* at 497 (Kennedy, J., concurring in the judgment in part and dissenting in part).

However, this Court has never held that a judicial bypass is required for a one-parent **notification** statute. Thus, by holding that a bypass *is* required in such cases, the court of appeals creates new law. In light of the views articulated by members of this Court, this creation is ill-founded.

Based upon prior opinions, at least five, and possibly six (discussed in Part I.B., *infra*), members of this Court would hold that a judicial bypass is **not** required in one-parent notification statutes, particularly if there are broad statutory exemptions from such a requirement. In sum, Justices Kennedy and Scalia, along with the Chief Justice, have emphasized that a judicial bypass is not needed in either a one or two-parent notification statute. *Id.* at 497 (Kennedy, J., concurring in the judgment in part and dissenting in part).[2] Based upon prior opinions, it is

[2] Specifically, Justice Kennedy, writing the dissent in *Hodgson* which was joined by Chief Justice Rehnquist and Justices White and Scalia, said of Minnesota's parental notice law, "Given the substantial protection that minors have under

likely that Justice Thomas would concur in these views. Furthermore, Justice O'Connor has stated that if a statute requires notifying only one parent, it is not necessary that a judicial bypass exist. *Id.* at 458-461 (O'Connor, J., concurring in part and concurring in the judgment in part).

Thus, because the decision of the court of appeals is contrary to the views of at least five members of this Court, the Petition For Certiorari should be granted to remedy this error.

B. A Judicial Bypass Is Nothing More Than A "Rubber Stamp" Which Is Not Needed In This Case Because Parental Abuse Is More Than Adequately Addressed In The South Dakota Parental Notice Law.

Justice Stevens has stated that if a judicial bypass exists in a *one*-parent notification statute, the statute is constitutional. *Id.* at 455-458 (Stevens, J., dissenting). As will be shown, the concerns which underlie this view are *better* allayed by the statutory scheme in the instant case than by a judicial bypass. Thus, Justice Stevens may also uphold the South Dakota law.

The purpose of a judicial bypass is not only to ensure the ability of a minor to obtain an abortion, *Bellotti*, 443 U.S. at 643, but also to protect her welfare in this regard, i.e., to determine that an abortion is indeed "in her best interests." *Id.* at 644. In terms of the latter, the Court is supposed to replace the role of the parent; it is supposed to function as "a **consent substitute** in the form of an

---

Minnesota law generally, and under the statute in question, the judicial bypass provisions of the law are not necessary to its validity. The two-parent notification law enacted by Minnesota is, in my view, valid without the judicial bypass provision. . . ." *Id.* at 489.

adequate judicial bypass procedure." *Hodgson*, 497 U.S. at 499 (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasis added). In short, the court is supposed to *assist* the minor in this important decision-making process.

However, far from assisting the minor child to any degree in this decision, both abortion opponents and proponents alike agree that the judicial bypass procedure is almost always a "rubber stamp," a routine judicial authorization for a minor to have an abortion without notifying her parents. For example, in Minnesota, interviews with minors at four abortion clinics revealed that 43% of the girls used the court bypass option that is part of that state's parental notification statute.[3] Of the 3,573 bypass petitions filed in the Minnesota courts when the parental notice law was in effect from August 1, 1981 to March 1, 1986, 3,558 were granted. Six of those petitions were withdrawn before decision; only nine were denied. *Hodgson v. Minnesota*, 648 F.Supp. 756, 765 (D. Minn. 1986). Judge Allen Oleisky has heard over 1,000 of these petitions and describes his role at a bypass hearing as "a routine clerical function on my part, just like putting my seal and stamp on it." *Id.* at 766.

Similarly, in Massachusetts, more than 90 percent of the bypass petitions are granted on the ground that the minor is "mature," and "almost all of the remaining minors' requests for abortion are approved as being in

---

[3] Blum, Resnick & Stark, *Factors Associated with the Use of Court Bypass by Minors to Obtain Abortions*, FAMILY PLANNING PERSPECTIVES, July-Aug. 1990, vol. 22, no. 4, p. 158. The four clinics that participated in the study account for more than 75 percent of the abortions in Minnesota.

their best interest."[4] Jamie Sabino, an attorney who coaches teenagers and walks them through the bypass process observes that "[o]f the minors that go to court, 98% of them are found to be mature – the judges don't even have to go on to the second tier hearing to determine if the abortion is in their best interest."[5] The hearings typically last 12 minutes;[6] the decision-making is perfunctory.[7]

The bypass procedure is not a reliable system of adjudging a minor's ability to make a mature decision. An analysis of cases in Massachusetts where minors were judged to be immature, but then had their abortions approved as being in their best interests, failed to reveal a single factor that could differentiate between maturity and immaturity.[8] Moreover, when lawyers and judges who handled the petitions would consider certain minors to be immature, they rarely could identify the same teenager.[9]

Thus, the judicial bypass procedure does not contain the element of mature, decision-making assistance which is supposed to exist as a substitute for that which the

---

[4] Melton, *Legal Regulation of Adolescent Abortion*, American Psychologist, January 1987, p. 80.

[5] Jamie Sabino, Esq. speaking at a meeting of "The Family Planning Advocates," Albany, New York (January 23-24, 1989).

[6] *Study Shows Teen Abortion Often Delayed 4-5 Days by State Laws*, Pediatric News, February 1989.

[7] Melton, *Legal Regulation of Adolescent Abortion*, p. 80.

[8] *Study Shows Teen Abortion Often Delayed 4-5 Days by State Laws*, Pediatric News, February 1989. Further, "the lack of variance in these rulings makes it impossible to compare statistically judgments of maturity."

[9] *Study Shows Teen Abortion Often Delayed 4-5 Days by State Laws*, Pediatric News, February 1989.

minor's parent would provide. Moreover, not only does this procedure not assist the minor in making this difficult decision, it actually puts *additional* stress on her. As this Court noted in *Hodgson*,

> [t]he judges who adjudicated over 90% of the bypass petitions [in Minnesota courts] testified; none of them identified any positive effects of the law. The court experience produced fear, tension, anxiety, and shame among minors, causing some who were mature, and some whose best interests would have been served by an abortion, to forego the bypass option and either notify their parents or carry to term.

497 U.S. at 441-442 (internal quotation marks omitted).[10] In light of its net harmful effect on minors, the question arises: why require a judicial bypass?

The one aspect for which a judicial bypass *might* be necessary is to ensure that a minor who is subject to physical or sexual abuse by her parents is not deprived of her ability to obtain an abortion solely for fear of notifying them of such a decision. The statute in this case,

---

[10] This Court also noted in *Hodgson* that,

> [o]ne [judge] testified that minors found the bypass procedure "a very nerve-racking experience"; . . . another testified that the minor's "level of apprehension is twice what I normally see in court." . . . A Massachusetts judge who heard similar petitions in that State expressed the opinion that "going to court was 'absolutely' traumatic for minors . . . 'at a very, very difficult time in their lives.' " . . . One judge stated that he did not "perceive any useful public purpose to what I am doing in these cases" and that he did not "see anything that is being accomplished that is useful to anybody."

Id. at 441, n.29 (internal citations omitted).

however, addresses this problem better than would a stressful judicial bypass procedure.

A judicial bypass may actually deter minors from reporting such abuse, for a minor would rather tell her physician, in confidence, of such abuse, than a judge in court. Such a deterrent would not only prevent a minor from obtaining an abortion, if that were in fact in her best interests, but it would also deprive her of the counseling and assistance she may need to deal with an abusive relationship. Those few cases in which parents may be abusive are best handled by ensuring that the child abuse and neglect authorities are informed, not by giving the child a secret abortion and sending her back into the abusive situation. The statute in question provides such assistance to the minor without depriving her of her constitutional rights.

If a minor is subject to abuse or neglect, the South Dakota parental notice law does not require that a parent be told the minor is considering an abortion. Instead, it provides that before performing an abortion, the physician report the abusive situation to the proper authorities, enabling them to intervene with counseling and support. If warranted, child abuse and neglect authorities can take steps to assure her protection, including removing her from the abusive home. Furthermore, in such cases, the statute allows the minor to obtain an abortion without having to notify either parent. *App.* at 84. In this regard, it is more effective than a judicial bypass.

Nevertheless, the court of appeals invalidated the statute because it did not provide for a judicial bypass. *App.* at 2. This erroneous decision (*see* Part I.A., *supra*) deprives South Dakota and her sister states of an effective, yet unintrusive, means of protecting the welfare of its minor citizens. This Court should grant the Petition

For Certiorari in order to correct this far-reaching, erroneous precedent and remedy the constitutional injustice to South Dakota.

II. THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI IN ORDER TO ELIMINATE THE CONFUSION AMONG THE CIRCUITS CONCERNING THE VIABILITY OF *UNITED STATES V. SALERNO* IN FACIAL CHALLENGES TO ABORTION STATUTES, WHICH IS MANIFEST IN THIS CASE AND IS ENGENDERED BY THIS COURT'S RECENT, INCONSISTENT PRONOUNCEMENTS ON THIS ISSUE.

This Court had traditionally employed clear standards in evaluating facial challenges to statutes. Outside of the First Amendment context, this standard required courts to give special consideration to the statutes so challenged. Specifically, it required that plaintiffs show the statute in question could never be applied constitutionally. This rule for evaluating facial challenges was established by this Court in *United States v. Salerno*, 481 U.S. 739 (1987), where it declared:

> [a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Id. at 745.

This Court had employed this facial challenge rule in well-known abortion cases as recently as 1991, in the case of *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), and 1992, in

Planned Parenthood of S.E. Pennsylvania v. Casey, 112 S. Ct. 2791 (1992). In *Rust*, this Court quoted and employed the *Salerno* analysis in rejecting a facial challenge to regulations prohibiting the use of public funds (in the Title X family planning program) for abortion counseling and referral, as well as activities advocating abortion as a method of birth control. *Id.* at 1767.

In other abortion cases, this Court has also expressly eschewed any (First-Amendment like) overbreadth doctrine. *See Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990) (citing *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment)). For example, in *Webster*, Justice O'Connor, co-author of the controlling joint opinion in *Casey*, explained that "some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially constitutional." *Id.* at 524.

Unfortunately, *Casey* has confused facial challenge jurisprudence outside of the First Amendment context by raising questions about the *Salerno* test in terms of its applicability to abortion cases. The question among members of both the bench and bar is whether the joint opinion by Justices O'Connor, Kennedy, and Souter replaced the normal facial challenge test with a new formula: whether for a "large fraction" of women affected by the statute the state regulation imposes an undue burden on women's ability to make decisions concerning whether or not to procure an abortion. *Casey*, 112 S.Ct. at 2830. It is the "large fraction" component of this (new?) standard which has left many puzzled.

Casey involved a challenge to the federal constitutionality of a Pennsylvania statute which required that

certain information be communicated to a woman seeking an abortion at least 24 hours before the procedure in order for her to consent to it. *Id.* at 2803. It also required that a married woman seeking an abortion notify her spouse (with certain exceptions designed to avoid abusive situations) before obtaining an abortion. *Id. Casey* was a facial challenge; the complaint was initiated before the law's provisions had taken effect. *Id.*

Because *Casey* concerned facial challenges, it would be expected that this Court would apply the *Salerno* test in evaluating its constitutionality. The *Casey* Court *did* apply this test when considering the 24-hour waiting period. The majority which upheld this provision consisted of Justices O'Connor, Kennedy, and Souter, *id.* at 2826 (joint opinion), as well as Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas. *Id.* at 2868 (Rehnquist, J., concurring in the judgment in part and dissenting in part). In so doing, the joint opinion *expressly* noticed that this *was* a **facial challenge**: "on the record before us, and in the context of this *facial challenge*, we are not convinced that the 24-hour waiting period constitutes an undue burden." *Id.* at 2826 (emphasis added).

Thus, any notion that this Court was abandoning the facial challenge rule for abortion statutes *might* have been laid to rest by this passage; it clearly takes note of the facial challenge posture of the case in deciding whether there is an undue burden and applies the undue burden test in this context.

However, while *Casey* applied the facial challenge test in considering the 24-hour waiting period, a different majority regrettably confused matters by its treatment of the spousal notice provision. This time, the joint opinion, speaking also for Justices Blackmun and Stevens, took note of Pennsylvania's assertion that the spousal notice

provision must be upheld because this was a facial challenge, and less than one percent of women seeking abortions would even be affected by this provision. *Id.* at 2892. The Court did not say that the facial challenge rule was inapplicable or even altered; rather, it "disagree[d] with [Pennsylvania's] basic method of analysis." *Id.*

Specifically, this Court held that "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there." *Id.* It then declared that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 2829. This Court insisted that, in such a situation, the "controlling class" was not all women who wish to obtain abortions, but rather "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions in the notice requirement." *Id.* at 2829-30. Because it opined that the spousal notice provision would be an "undue burden" on a "large fraction" of these women, the Court held it was invalid.

As noted, this language has caused confusion regarding the continuing viability of the *Salerno* rule for facial challenges to abortion statutes. Under the *Salerno/Rust* formulation, if only a "large fraction" of this one percent of women would experience an undue burden, then the statute should survive a facial challenge because *Salerno* requires that the statute have no constitutional applications in order for it to succumb to such a challenge. As a result, Chief Justice Rehnquist noted in his dissent in *Casey* that the joint opinion "appears to ignore" the traditional facial challenge standard of review. *Id.* at 2870 & n.2.

For at least two reasons, some commentators believe it is unlikely that this Court intended to overrule the

general applicability of the facial challenge rule via the analysis it employed in *Casey*. First, they note that this analysis seems to be an anomaly of the sort common to abortion jurisprudence, to wit, the "abortion distortion" effect, whereby the law is lamentably distorted wherever it is touched by abortion. *See, e.g.*, Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. PUB. L. 181 (1989) (cataloging at length the abortion-distortion effect).[11]

Second, they point out it is unlikely that the Court intended to overrule *sub silentio* the facial challenge doctrine with regard to abortion cases, or cases in general, by its analysis in one part of *Casey*. As noted, only four years ago in *Rust*, when faced squarely with the issue, this Court employed the *Salerno* facial challenge principle in a major abortion case. Given this Court's recent, express

---

[11] Numerous normal rules of law have been ignored in abortion decisions, including, but not limited to, rules involving: (1) standing, *see* Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 160-67 (criticizing the misuse of the standing rules in *Roe v. Wade*); (2) mootness, *see id.* (pointing out *Roe*'s distortion of the mootness standards); (3) not going to the merits of a case before a trial is held or facts developed, *see Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 814-15 (1986) (O'Connor, J., dissenting) ("If this case did not involve state regulation of abortion, it may be doubted that the Court would entertain, let alone adopt, such a departure from its precedents."); (4) construing statutes where fairly possible in a constitutional manner, *see Thornburgh*, 476 U.S. at 812 (White, J., dissenting) ("The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs."); and (5) vagueness, *see Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 475 (1983) (O'Connor, J., dissenting) (asserting that the Court was distorting the void for vagueness rule).

adherence to the *Salerno* rule in *Rust*, it is doubtful, they believe, that it would silently overrule such an important principle only one year later in *Casey*. *Id.*

In light of these two factors, some cases have assumed no *sub silentio* overruling of the *Salerno/Rust* facial challenge rule with regard to abortion cases, let alone other cases.[12] For example, in *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 656 (1992),[13] the Fifth Circuit cited *Salerno* and Chief Justice Rehnquist's dissent (in part) in *Casey* as authority for using the traditional facial challenge standard. *Id.* at 14. In footnote two, the *Barnes* court observed that:

> The *Casey* joint opinion may have applied a somewhat different standard in striking down the spousal notification provision of the Pennsylvania Act, not in issue here. Nevertheless, we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes.

Id. at 14 n.2.

The Fifth Circuit's view has been validated by recent pronouncements by justices of this Court. For example, in his dissent to the Court's refusal to grant certiorari in the Guam abortion case of *Ada v. Guam Society of Obstetricians*

---

[12] In addition, outside the abortion area, the debate over *Casey* goes unnoticed, as in the case of *Action for Children's Television v. FCC*, 827 F.Supp. 4 (D.D.C. 1993). In this post-*Casey* case, the district court quoted *Rust* and *Salerno* for the facial challenge rule and proceeded to apply it to uphold the statute being challenged. *Id.* at 16.

[13] *Barnes* involved a facial challenge to the Mississippi Informed Consent to Abortion Act, which required physician disclosure of certain information to women seeking an abortion and a 24-hour wait before the procedure could be performed.

& Gynecologists, 113 S. Ct. 633 (1992), Justice Scalia, joined by Chief Justice Rehnquist and Justice White, pointed out that *Casey* did not alter the facial challenge analysis. In so doing, he initially noted the problems with such a change in the law:

> Facial invalidation based on overbreadth impermissibly interferes with the state process of refining and limiting – through judicial decision or enforcement discretion – statutes that cannot be constitutionally applied in all cases covered by their language. And it prevents the State (or territory) from punishing people who violate a prohibition that is, in the context in which it is applied, entirely constitutional.

Id. at 634. With these problems in mind, Justice Scalia concluded that "[t]he Court did not purport to change this well-established rule last Term, in [*Casey*]." *Id.*

However, other courts have taken a different approach. They note that the facial challenge rule was ignored by the *Casey* majority in considering the spousal notice provision, but limit the holding of the Court on this issue to the narrow facts on which it was decided and ignore it in other cases. This may be due to their appreciation of the abortion-distortion effect.

For example, in *Jane L. v. Bangerter*, 809 F. Supp. 865 (D. Utah 1992), a federal district court considered a facial challenge to Utah's abortion law which, *inter alia*, required spousal notification. In its decision, the court relied, in part, *id.* at 872, on Justice Scalia's dissent in *Ada v. Guam Society of Obstetricians & Gynecologists*. While it noted that his comments were made in dissent, it also observed that they were made by three justices and "reiterates the familiar rule of law which continues to be binding upon lower courts." *Jane L.*, 809 F. Supp. at 872. It added that, "[t]he Supreme Court has consistently

refused to apply the doctrine of overbreadth beyond the First Amendment context." *Id.* (citing *Salerno* and *Rust*).

In this regard, the court noted that the case involved a facial challenge, quoting *Salerno* and *Rust*, *id.* at 871 & n.10, 878 & n.33, but also noted that "it seems that in some contexts [this Court has], *sub silentio*, abandoned the traditional facial challenge approach in favor of an undue burden approach." *Id.* at 871 & n.10. As a result, it struck down the spousal notice statute, following *Casey's* altered facial challenge analysis. *Id.* at 876 & n.27. However, with regard to the rest of the provisions at issue, it followed the standard facial challenge rule and upheld them. *Id.* at 871 & n.10; 878 & n.33.

At the other end of the spectrum, some courts have concluded that in *Casey*, this Court completely overruled the *Salerno/Rust* analysis in all abortion jurisprudence, not merely with regard to spousal notice provisions. For example, after this Court's *Casey* decision, the Third Circuit, in *Casey v. Planned Parenthood*, 14 F.3d 848 (3rd Cir. 1994), opined that in *Casey*, this Court had "set a new standard for facial challenges to pre-viability abortion laws." *Id.* at 863 n.21. The new standard, according to the Third Circuit, "requires only that a plaintiff show an abortion regulation would be an undue burden 'in a large fraction of the cases.' " *Id.* While this comment was *dictum*, it reflects the views of the Third Circuit, which are at odds with those of the Fifth Circuit (*see* discussion, *supra*).

Other justices of this Court seem to validate this view of *Casey*. For example, in *Fargo Women's Health Org. v. Schafer*, 113 S. Ct. 1668 (1993), Justice O'Connor, joined by Justice Souter, expressed her opinion on the facial challenge issue, though it, too has no precedential

value.[14] She stated that *Casey* had eliminated the usual facial challenge test for "a law restricting abortions" in favor of a test striking down abortion restrictions as undue if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 1669 (internal quotes and citation omitted). Significantly, Justice Kennedy, who co-authored the *Casey* joint opinion, did not join in this opinion, nor did Justices Blackmun and Stevens, whose partial concurrences made possible the striking down of the Pennsylvania spousal notice statute, thus implying that these justices may no longer share their colleagues' views.

In sum, given that the Chief Justice and Justices White and Scalia agree that the facial challenge rule was not overturned in *Casey;* Justices O'Conner and Souter have expressed contrary views; Justices Kennedy and Stevens may have shied away from their prior views; and the other justices have not weighed in on the controversy, only one thing is clear regarding the continuing viability of the *Salerno/Rust* rule in the aftermath of *Casey:* there is no clear pronouncement of this Court concerning its applicability in abortion jurisprudence.

This confusion is evidenced by the views of lower federal courts, e.g., *Barnes, Jane L.*, and *Casey* (Third Circuit opinion), including the view of the Eighth Circuit in this case, which, like that of the Third Circuit, conflicts with the holding of the Fifth Circuit on this issue. The

---

[14] *Schafer* involved a facial challenge to North Dakota's abortion statute. The district court applied the *Salerno/Rust* facial challenge test and dismissed the complaint; the Eighth Circuit affirmed. *Id.* This Court denied a stay and injunction pending appeal. *Id.*

Court should grant the petition in order to provide guidance in this murky area of the law.

CONCLUSION

Wherefore, your *amici* respectfully request that the Court grant the Petition for Writ of Certiorari in this case.

Dated: January 2, 1996

Respectfully submitted,

JAMES BOPP, JR.
Counsel of Record

JOHN K. ABEGG
BOPP, COLESON & BOSTROM
2 Foulkes Square
401 Ohio Street
P.O. Box 8100
Terre Haute, IN 47808
(812) 232-2434

MARY B. SPAULDING
JAMES BRADLEY GEHRKE
NATIONAL RIGHT TO
LIFE COMMITTEE
419 7th Street, N.W.
Suite 500
Washington, D.C. 20004
Telephone (202) 626-8815

Counsel for Amicus Curiae

Supreme Court, U.S.
FILED
JAN 12 1996
CLERK

No. 95-856

In The

Supreme Court of the United States

October Term, 1995

WILLIAM J. JANKLOW, GOVERNOR AND
MARK W. BARNETT, ATTORNEY GENERAL,
IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

PLANNED PARENTHOOD, SIOUX FALLS CLINIC,
BUCK J. WILLIAMS, M.D., AND
WOMEN'S MEDICAL SERVICES, P.C.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITIONERS' REPLY BRIEF

MARK W. BARNETT
Attorney General
State of South Dakota
Counsel of Record

JOHN P. GUHIN
JANINE KERN
Deputy Attorneys General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone (605) 773-3215
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES CITED:

INTRODUCTION

Contrary to the view of the Respondents, this case presents the opportunity for this Court to decide three important, and unanswered, legal questions. The first question is whether a one-parent notice statute is required to contain a judicial bypass. The second question is whether *United States v. Salerno*, 481 U.S. 739 (1987), continues to apply to facial challenges to abortion laws or whether that standard has been displaced, *sub silentio*, by the "undue burden" standard of the Joint Opinion in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992). The third question is whether and how the "undue burden" standard can be applied in a principled and neutral fashion, particularly that part of the standard which requires courts to determine whether a "large fraction" of the affected class is subject to an "undue burden." The authors of the Joint Opinion recognized that the "undue burden" standard would generate the "need for" further review by this Court, *Casey*, 112 S.Ct. at 2809, but for almost four years state legislatures and courts have struggled to discern the meaning and implications of this standard without any further clarification or guidance from this Court.

ARGUMENT

I

RESPONDENTS HAVE CONCEDED THAT THE EIGHTH CIRCUIT COURT OF APPEALS AND THE FIFTH CIRCUIT COURT OF APPEALS HAVE RENDERED CONFLICTING DECISIONS ON WHETHER *UNITED STATES v. SALERNO* CONTINUES TO APPLY TO FACIAL CHALLENGES TO ABORTION LAWS.

The State's Petition argues that a grant of certiorari is appropriate because the Fifth Circuit decision in *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 656 (1992) conflicts with the decision of the Eighth Circuit Court of Appeals in this litigation on the issue of whether the "facial challenge" rule of *United States v. Salerno*, 481 U.S. 739 (1987) continues to apply to facial challenges to abortion laws. Planned Parenthood grudgingly agrees that such a conflict exists. Respondents' Brief (R.B.) at 4 n.2.

Respondents nonetheless contend that "consistency" would be served by denying certiorari but this goal is hardly met by withholding guidance to the states and lower courts on this issue. We also note the fallacy of Respondents' argument that, if the facial challenge rule is not found to have been overruled, abortion rights will regularly be allowed to "evaporate." Respondents thus ignore the efficacy of the "as applied" challenge and the ability of state and federal courts to grant emergency relief in appropriate situations.

II

THIS COURT SHOULD SETTLE THE QUESTION OF WHETHER A JUDICIAL BYPASS IS REQUIRED AS A COMPONENT OF A SINGLE-PARENT NOTICE STATUTE.

Respondents do not deny that this Court has not decided the question of whether the single-parent notice statute must contain a judicial bypass mechanism. *See Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510 (1990) (*Akron II*).

Moreover, the critical elements of South Dakota's statute indicate that it is, in fact, constitutional. In particular, South Dakota's statute passes constitutional muster because it requires only notice, and not consent, and to only one parent. Further, the statute exempts even from this requirement a very broadly defined class of "abused and neglected" minors. *See* App. 84-85. Virtually all "best interest" minors are covered by the "abuse and neglect" exception and the notification of one parent by a "mature minor" does not, we contend, unconstitutionally interfere with or, alternatively, "unduly burden" her right to an abortion.

Respondents nonetheless seek to persuade this Court to deny certiorari on the grounds that the question cannot be important because only South Dakota has enacted a single-parent notice statute with no judicial bypass. Respondents are, however, well aware that many state legislatures are carefully watching this case and that it is of "national importance."

III

THE STANDARD OF REVIEW FOR ABORTION LEGISLATION SHOULD BE DEFINITIVELY ARTICULATED.

Relying on the Joint Opinion in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), Respondents assert that this Court has established that all abortion laws must be adjudged under the "undue burden" standard. But only three Justices subscribed fully to the critical portion of the Joint Opinion. Moreover, one of those Justices at least arguably drew into question his continued adherence to the "undue burden" standard by failing to join in the concurrence in *Fargo Women's Health Organization v. Schafer*, 113 S.Ct. 1668 (1993) (O'Connor and Souter, JJ., concurring in Memorandum Decision).

Casey, moreover, indicates that the "undue burden" analysis cannot be applied to parental notice or consent statutes. Under the "undue burden analysis," at "stake is the woman's right to make the ultimate decision," *Casey*, 112 S.Ct. at 2821, and the state may not prohibit any woman from obtaining an abortion before viability. *Id.* But *Casey* itself recognized the constitutionality of a statute which provides that if neither parent nor a judge consents to a minor's abortion, the minor will not be able to obtain an abortion. *Casey*, 112 S.Ct. at 2832. The "undue burden" analysis, therefore, cannot logically be applicable to parental consent or notice statutes.

Not only does *Casey* itself belie Respondents' argument, but *Hodgson v. Minnesota*, 497 U.S. 417 (1990) strongly indicates that the "rational relationship" test should be used in testing parental notice statutes. *See id.*,

497 U.S. at 490, 496, 500-501 (Kennedy, J., Rehnquist, C.J., White and Scalia, JJ.); *id.*, 497 U.S. at 450 (Stevens, J.); *id.*, 497 U.S. at 459 (O'Connor, J.).

Acceptance of certiorari in this case would allow the Court to clarify the application of the standard of review both with respect to abortion statutes generally and with regard to parental notice statutes in particular.

IV

THE COURT OF APPEALS MISAPPLIED THIS COURT'S DECISIONS WITH REGARD TO NOTICE STATUTES GENERALLY AND SINGLE-PARENT NOTICE STATUTES.

A. The court of appeals incorrectly found South Dakota's notice statute to be the legal equivalent of a consent statute.

The court below premised its decision on the theory that a notice statute was the rough equivalent of a consent statute. *See* App. 16, *id.* at 17. This treatment, however, is legally erroneous under *Akron II*, 497 U.S. at 510-511, and merits reversal by this Court.

B. The court of appeals incorrectly found that South Dakota's one-parent notice statute was equivalent to a two-parent notice statute.

This Court's opinions in *Hodgson* clarify that a one-parent notice is not legally equivalent to a two-parent notice statute. *See Hodgson*, 497 U.S. at 450-452; *id.*, 497 U.S. at 459 (O'Connor, J., concurring). Nor did the evidence in this case justify equivalent treatment. We note,

particularly, that Respondents cite no evidence that any child existed within South Dakota who could not contact a second parent so as to give notice. See, R.B. 8-9. Therefore, the treatment by the court below of South Dakota's one-parent notice as equivalent to a two-parent notice statute, see, App. 22-25; App. 24 at n.10, was legally erroneous.[1]

V

THE COURT OF APPEALS DID NOT "FAITHFULLY FOLLOW" THIS COURT'S "UNDUE BURDEN" ANALYSIS.

Respondents assert that the court below properly applied the "undue burden" test as articulated by the Court. There has, however, been but one decision of this Court applying that standard, *Casey* itself, and this case demonstrates that the courts are in need of additional guidance from this Court as to its application.

A. The court of appeals misapplied the "undue burden" standard with regard to mature minors.

The Joint Opinion in *Casey* made it abundantly clear that the "undue burden" analysis is not a mechanical one and must be carefully applied. The Joint Opinion also

[1] The court justified its approach by finding that 18 percent of minors lived in one-parent homes. App. 24 at n.10. This says virtually nothing about whether the second parent could be notified, notwithstanding the court's conclusory language to the contrary.

carefully distinguished the *spousal* relationship from the *parent-child* relationship. *Casey*, 112 S.Ct. at 2830, 2831. The court of appeals thus misapplied the "undue burden" standard when it treated the single-parent notice statute as equivalent to the spousal notification requirement. App. at 16-17.[2]

B. Better protections are available for abuse victims in South Dakota than in judicial bypass states.

Respondents are clearly unable to answer South Dakota's claim that its statute better provides for abuse victims than does an exclusively judicial bypass system. In South Dakota, the abuse victim can notify the doctor of the abuse, which is plainly *less* of a burden on a minor than reporting abuse to a judge in a judicial bypass proceeding. *See, e.g.*, Affidavit of Dr. Elkind at ¶ 5. Respondents argue, in defense of the decision of the court of appeals, that a mature minor could avoid telling a judge of sexual abuse by demonstrating that she is mature. Respondents also say that a "best interest" minor can demonstrate that an abortion is "in her best interests for some other reason" than the sexual abuse and so avoid telling a judge of the sexual abuse. R.B. at 10 n.6. Respondents thus tell the Court, in effect, that the "mature" and "best interest" minors should be able to conceal from a court their primary reasons for obtaining their abortions (i.e. sexual abuse), that the state and the

[2] Contrary to the Respondents' implication, R.B. at 9, this Court has never held that a mature minor has a constitutional right to refuse to notify one parent about an intended abortion.

court should cooperate in that concealment, that the abortions should be allowed, and that both the "mature" and "best interest" minors should then be returned to their homes where the abuse occurred. This result is not demanded by the United States Constitution.

C. The lower courts need the guidance of this Court in determining when a "large fraction" of minors are unduly burdened.

The court of appeals found that a "large fraction" of minors were "unduly burdened" by the state single-parent notice statute, *see* App. 25, but it is not possible to determine how the existence of the "large fraction" was ascertained, or in particular, what the court of appeals determined to be the numerator and denominator of the fraction.[3] It appears that the court simply made its "best guess," which, we assert, is a constitutionally inadequate basis on which to strike a state law. The State submits that the lower courts need the guidance of this Court in applying this test in a principled manner.

D. The statutory arrangement in South Dakota protects the confidentiality of the minor's abortion.

Respondents contend that the construction by the court of appeals of the South Dakota statutes regarding

[3] We note that Respondent Williams reported that only one pregnancy was aborted as a result of rape or incest on minors under 17 between 1986 and 1993. Affidavit of Doris J. Donner, Ex. 3.

confidentiality should be sustained, citing *Frisby v. Schultz*, 487 U.S. 474 (1988). *Frisby*, however, clearly contemplates examination of the question by two lower courts; in our case, only the court of appeals examined the issue. Moreover, the strained construction of state law by the court of appeals, which yielded a finding of an unconstitutional "undue burden," is to be avoided under the cases of this Court, including *Frisby*, 487 U.S. at 483. *See also, Webster v. Reproductive Health Services*, 492 U.S. 490, 514 (1989) (Rehnquist, C.J.).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

MARK W. BARNETT
Attorney General
Counsel of Record

JOHN P. GUHIN
JANINE KERN
Deputy Attorneys General
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

January 1996

SUPREME COURT OF THE UNITED STATES

WILLIAM J. JANKLOW, GOVERNOR OF SOUTH DAKOTA ET AL. *v.* PLANNED PARENTHOOD, SIOUX FALLS CLINIC ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95–856. Decided April 29, 1996

The motion of National Right to Life Committee, Inc., for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

Memorandum of JUSTICE STEVENS, respecting the denial of the petition for certiorari.

The Court's opinion in *United States* v. *Salerno*, 481 U. S. 739 (1987), correctly summarized a long established principle of our jurisprudence: "The fact that [a legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.*, at 745.

Unfortunately, the preceding sentence in the *Salerno* opinion went well beyond that principle. That sentence opens Part II of the opinion with a rhetorical flourish, stating that a facial challenge must fail unless there is "no set of circumstances" in which the statute could be validly applied. *Ibid.*; *post*, at 3. That statement was unsupported by citation or precedent. It was also unnecessary to the holding in the case, for the Court effectively held that the statute at issue would be constitutional as applied in a large fraction of cases. See 481 U. S., at 749–750.

While a facial challenge may be more difficult to mount than an as-applied challenge, the dicta in *Salerno* "does not accurately characterize the standard for deciding facial challenges," and "neither accurately

reflects the Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles." Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 236, 238 (1994). For these reasons, *Salerno*'s rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context.[1] Accordingly, there is no need for this Court affirmatively to disavow that unfortunate language, in the abortion context or otherwise, until it is clear that a federal court has ignored the appropriate principle and applied the draconian "no circumstance" dictum to deny relief in a case in which a facial challenge would otherwise be successful.[2] I thus concur in the denial of this petition.

[1] See, *e.g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 895 (1992) (statute facially invalid as "substantial obstacle" to exercise of right in "large fraction" of cases); *id.*, at 972–973 (REHNQUIST, C. J., concurring in judgment in part and dissenting in part) (arguing that "no circumstance" dictum should have led to different result); *Kraft Gen. Foods, Inc.* v. *Iowa Dept. of Revenue and Finance*, 505 U. S. 71, 82 (1992) (REHNQUIST, C. J., dissenting) (arguing that tax statute was facially valid because it would be constitutional under certain facts); *INS* v. *National Center for Immigrants' Rights*, 502 U. S. 183, 188 (1991) (applying appropriate rule: "That the regulation may be invalid as applied in [some] cases, . . . does not mean that the regulation is facially invalid"); *Bowen* v. *Kendrick*, 487 U. S. 589, 602 (1988) (statute facially invalid under Establishment Clause only if, *inter alia*, law's "primary effect" is advancement of religion, or if it requires "excessive entanglement" between church and state); *id.*, at 627, n. 1 (Blackmun, J., dissenting) (pointing out and agreeing with majority's failure to apply "no circumstance" dictum); *Schaffer* v. *Heitner*, 433 U. S. 186 (1977) (examining facial validity of state statute permitting exercise of personal jurisdiction over defendant without reference to whether statute was constitutional as applied to petitioner).

These cases, along with other decisions and the holding in *Salerno* itself (that the challenged Act was constitutional in *most* circumstances, not merely *one*), should have braced the dissent against the minor risk of whiplash from the "head-snapping" observation, *post*, at 5, that our "doctrinal pattern is somewhat more complex" than *Salerno*'s "no circumstance" language suggests, Fallon, Making Sense of Overbreadth, 100 Yale L. J. 853, 859, n. 29 (1991) (citing cases).

[2] In all likelihood, the decision of the Fifth Circuit applying the "no circumstance" test would have been decided the same way even if that court had utilized the "large fraction" test applied by the Eighth Circuit in this case. See *Barnes* v. *Moore*, 970 F. 2d 12, 14 (CA5 1992) (noting that the provisions at issue were "substantially identical" to provisions upheld in *Casey*).

Furthermore, it is not at all clear to me, given intervening statements by Members of this Court, see *Fargo Women's Health Organization* v. *Schafer*, 507 U. S. 1013, 1014 (1993), that subsequent Fifth Circuit panels would follow *Barnes*' application of the "no circumstance" test, providing yet another reason to deny the petition in this case.

SUPREME COURT OF THE UNITED STATES

WILLIAM J. JANKLOW, GOVERNOR OF SOUTH DAKOTA ET AL. *v.* PLANNED PARENTHOOD, SIOUX FALLS CLINIC ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95–856. Decided April 29, 1996

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

In this case, the United States Court of Appeals for the Eighth Circuit declared unconstitutional a South Dakota law which requires a physician to notify a pregnant minor's parent of an impending abortion 48 hours before the abortion is to be performed.[1] The court's basis for the invalidation was that "*a large fraction* of minors seeking pre-viability abortions would be unduly burdened by [the] statute, despite its abuse

---

[1] South Dakota Codified Laws §34–23A–7 (1994 rev.) provides, in relevant part:

"No abortion may be performed upon an unemancipated minor or upon a female for whom a guardian has been appointed because of a finding of incompetency, until at least forty-eight hours after written notice of the pending operation has been delivered in the manner specified in this section. The notice shall be addressed to the parent at the usual place of abode of the parent and shall be delivered personally to the parent by the physician or an agent. In lieu of such delivery, notice may be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee, which means a postal employee can only deliver the mail to the authorized addressee. If notice is made by certified mail, the time of delivery shall be deemed to occur at twelve o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing."

exception,"[2] *Planned Parenthood, Sioux Falls Clinic* v. *Miller,* 63 F. 3d 1452, 1463 (1995) (emphasis added).

This decision is questionable enough that we should, since the invalidation of state law is at issue, accord review. Among other things, it rested upon the court's belief that "it seems, South Dakota's abuse exception will sometimes result in parental notification, even if after-the-fact." *Id.,* at 1461. That reasoning is inconsistent with our holding in *Ohio* v. *Akron Center for Reproductive Health,* 497 U. S. 502, 514 (1990), another case involving a parental notification provision, that "[t]he Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur." The Eighth Circuit's holding is also dependent on the questionable conclusions (1) that "parental-notice provisions, like parental-consent provisions, are unconstitutional without

---

[2]South Dakota Codified Laws §34–23A–7 (1994 rev.) sets forth the following exceptions to its notice requirement:

"No notice is required under this section if:

"(1) The attending physician certifies in the pregnant minor's medical record that, on the basis of the physician's good faith clinical judgment, a medical emergency exists that so complicates the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function and there is insufficient time to provide the required notice; or

"(2) The person who is entitled to notice certifies in writing that he has been notified; or

"(3) The pregnant minor declares, or provides information that indicates, that she is an abused or neglected child as defined in §26–8A–2 and the attending physician has reported the alleged or suspected abuse or neglect as required in accordance with [state law]. In such circumstances, the department of social services, the state's attorney and law enforcement officers to whom the report is made or referred for investigation or litigation shall maintain the confidentiality of the fact that she has sought or obtained an abortion and shall take all necessary steps to ensure that this information is not revealed to her parents."

a *Bellotti*-type bypass," 63 F. 3d, at 1460, see *Bellotti* v. *Baird*, 443 U. S. 622 (1979), and (2) that the South Dakota law's exception for abused and neglected minors did not satisfy the need for a bypass procedure, 63 F. 3d, at 1460–1463.

Beyond these issues, however (or, more accurately, preceding them), is another question that virtually cries out for our review. In *United States* v. *Salerno*, 481 U. S. 739 (1987), summarizing a long established principle of our jurisprudence, we observed:

> "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Id.*, at 745.

It has become questionable whether, for some reason, this clear principle does not apply in abortion cases. As I observed three Terms ago in a case very similar to this one, we have sent mixed signals on the question—seemingly employing an overbreadth approach in *Roe* v. *Wade*, 410 U. S. 113 (1973), but explicitly rejecting that approach in such later abortion cases as *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 514 (1990), and *Rust* v. *Sullivan*, 500 U. S. 173, 183 (1991).[3] In dissenting from denial of certiorari in

[3]See also *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 524 (1989) (O'CONNOR, J., concurring in part and concurring in judgment) ("[S]ome quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional"). JUSTICE STEVENS' memorandum in support of the denial of certiorari says that the *Salerno* rule

Ada v. *Guam Soc. of Obstetricians & Gynecologists*, 506 U. S. 1011, 1013 (1992) I expressed my view that "[t]he Court did not purport to change this well-established rule . . . in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992)." Since then, two Members of the *Casey* majority have expressed their view that *Salerno* is "inconsistent with *Casey*." See *Fargo Women's Health Organization* v. *Schafer*, 507 U. S. 1013, 1014 (1993) (O'CONNOR, J., joined by SOUTER, J., concurring).

In this case—after reviewing the incompatible pronouncements of the Court's opinions on this subject, and remarking that "even the Justices of the Supreme Court dispute *Casey*'s effect," 63 F. 3d, at 1457—the Court of Appeals concluded, in effect, that *Salerno* had been chewed up by the "ad hoc nullification machine" which is our abortion jurisprudence, *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. ___, ___ (1994) (slip op., at 2) (SCALIA, J., dissenting). The court decided that *Casey*, without so much as alluding to the facial-challenge rule, "effectively overruled *Salerno* for facial challenges to abortion statutes," 63 F. 3d, at 1458. This holding conflicts head-on with a post-*Casey* decision of the Fifth Circuit. In *Barnes* v. *Moore*, 970 F. 2d 12, cert. denied, 506 U. S. 1021 (1992), the Fifth Circuit rejected a facial challenge to the Mississippi Informed Consent to Abortion Act. In the process, it said that "[b]ecause the plaintiffs are challenging the facial validity of the Mississippi Act, they must 'establish that no set of

"has been properly ignored in subsequent cases even outside the abortion context." *Ante*, at 2. If he means by this that the rule has *consistently* been ignored, the statement is proved false by the cases cited here in text, where the rule was both recited and followed. (And there are other post-*Salerno* cases reciting and applying the rule outside the abortion context, see, *e.g.*, *Anderson* v. *Edwards*, 514 U. S. ___, ___, n. 6 (1995) (slip op., at 11, n. 6), and *Reno* v. *Flores*, 507 U. S. 292, 301, 309 (1993).) If, on the other hand, JUSTICE STEVENS merely means that the *Salerno* rule has *sometimes* "been ignored," though it has other times been *applied*, then he makes a good case for granting rather than denying certiorari.

circumstances exists under which the Act would be valid,'" 970 F. 2d, at 14, adding that "we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes," *id.*, at 14, n. 2. The split between the Fifth and Eighth Circuits is unmistakably clear. The Third Circuit has also weighed in on this question (albeit in dictum), siding with the Eighth Circuit. See *Casey* v. *Planned Parenthood of Southeastern Pa.*, 14 F. 3d 848, 863, n. 21 (1994).

The *Salerno* question could not be more squarely presented. The Court of Appeals explained that *"[t]he critical issue* in this case is . . . what is the standard for a challenge to the facial constitutionality of an abortion law?" 63 F. 3d, at 1456 (emphasis added). It specifically acknowledged that "Planned Parenthood cannot meet the *Salerno* test." *Id.*, at 1457. Had the Court of Appeals not concluded that the *Salerno* rule has been selectively (and *sub silentio*) nullified in abortion cases, respondents' facial challenge quite simply would have failed.

JUSTICE STEVENS' memorandum in support of the denial of this petition provides even stronger reasons than I have why it should be granted. JUSTICE STEVENS asserts that *Casey* could not possibly have been contrary to the "no set of circumstances" rule because, contrary to the repeated statement of our cases, *that rule never existed*. For that head-snapping proposition, he relies upon no less weighty authority than a law-review article by Michael C. Dorf. According to that author, THE CHIEF JUSTICE'S statement on behalf of the Court in *Salerno* was not only "wrong" but "draconian." Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 238, 239 (1994); see *ante*, at 2. But if that is so, if *Salerno* is a dead letter *even outside of the abortion context*, all the more reason to grant certiorari and make that clear.[4] For the courts of appeals regularly enforce that supposed dead letter, often in cases in which its "draconian" character prevents the facial challenge from succeeding. See, *e.g.*, *Chemical Waste Management, Inc.* v. *United States Environmental Protecton Agency*, 56 F. 3d 1434, 1437 (CADC 1995) ("We discern at least one scenario where the off-site rule would be procedurally valid. . . . While this hypothetical scenario may not be common, it is sufficient to establish that petitioners' facial challenge must fail"); *United States* v. *Mena*, 863 F. 2d 1522, 1527 (CA11 1989) ("[T]he defendants have simply failed even to suggest 'that no set of circumstances exists under which the Act would be valid.' Such is the defendant's burden in a case challenging the facial validity of a congressional enactment on other than first-amendment grounds"); *Roulette* v. *Seattle*, ___ F. 3d ___, ___ (CA9 1996) ("Plaintiffs have conceded that 'the city may prevent individuals or groups of people from sitting or lying across a sidewalk in such a way as to prevent others from passing.' The Seattle ordinance plainly may be applied to such cases, and plaintiffs' facial substantive due process challenge therefore fails") (citation omitted); *Government Suppliers Consolidating Servs., Inc.* v. *Bayh*, 975 F. 2d 1267, 1283 (CA7 1992); *Dean* v. *McWherter*, 70 F. 3d 43, 45 (CA6 1995); *National Treasury Employees Union* v. *Bush*, 891 F. 2d 99, 101 (CA5 1989) ("[B]ecause not every application of the Order would be invalid, the Order is facially valid"); *Jordan* v. *Jackson*, 15 F. 3d 333, 343–344 (CA4 1994); *Giusto* v. *INS*, 9 F. 3d 8, 10 (CA2 1993).

Finally, I cannot let pass without comment JUSTICE

---

[4] While we are in the process of adopting Prof. Dorf's revisionist view of *Salerno*, we could also embrace his modest proposal for what ought to replace the rule described in that case. His proposal is not, curiously enough, the regime that JUSTICE STEVENS suggests, but rather total elimination of the distinction between facial and as-applied challenges. Dorf, *supra*, at 294.

STEVENS' suggestion that Fifth Circuit panels might, in future abortion cases, ignore the clear language of *Salerno*, and the Fifth Circuit's own decision in *Barnes*, "given intervening statements by Members of this Court"—by which he means the memorandum of JUSTICE O'CONNOR, joined by JUSTICE SOUTER, concurring in the Court's Order of April 2, 1993, denying (without opinion) the application for stay and injunction pending appeal in *Fargo Women's Health Organization* v. *Shafer*, 507 U. S. 1013 (1993). See *ante*, at 2, n. 2. That the Fifth Circuit *might* give such authoritative effect to this two-Justice concurrence is certainly true; courts of appeals, no less than practitioners, sometimes count votes instead of following cases. But I am surprised to find that practice endorsed by JUSTICE STEVENS, who has hitherto taken a dim view of separate writings appended to discretionary (and unexplained) denials, calling "all opinions dissenting from the denial of certiorari" "totally unnecessary" and "examples of the purest form of dicta." *Singleton* v. *Commissioner*, 439 U. S. 940, 944–945 (1978) (STEVENS, J., respecting the denial of certiorari). More fundamentally, I find it hard to understand why one who believes that *Salerno*'s "no set of circumstances" rule is nothing more than unwise, rigid and inaccurate dictum, *ante*, at 1–2, would not seize upon this opportunity "affirmatively to disavow" it, *ante*, at 2, instead of hoping that the courts of appeals will be induced to abandon it by reading the tea leaves of concurring opinions. Today's denial serves only one rational purpose: it makes our abortion ad hoc nullification machine as stealthful as possible.

For the foregoing reasons, I dissent from the Court's denial of the petition for certiorari.